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AN OVERVIEW OF OHIO PRODUCT LIABILITY LAW

STEPHEN J. WERBER[1]

INTRODUCTION 381
I. THE CAUSE OF ACTION 384
A. *Defects in Manufacture or Construction (Ohio Rev. Code § 2307.74)* 384
B. *Defects in Design or Formulation (Ohio Rev. Code § 2307.75)* 386
1. Defining Defect 386
2. Subsequent Modification/Alteration 388
Additional Decisions 389
C. *Defects in Warning or Instructions (Ohio Rev. Code § 2307.76)* 389
Additional Decisions 392
1. Defective when Left Control of Manufacturer 392
2. Failure to Warn or Instruct 392
3. Post-Market Failure 392
4. Preemption 393
D. *The Unavoidably Unsafe Product (Ohio Rev. Code § 2307.75)* 393
Additional Decisions 394
E. *Defect by Failure to Conform to Representation (Ohio Rev. Code § 2307.77)* 395
Additional Decisions 396
F. *Crashworthiness/Second Collision/Enhanced Injury Liability* 396
Additional Decisions 397
1. Application of the Principle 397
2. Burden of Proof 399

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II. DEFENSES 400
A. The Statute of Limitations 400
B. Foreseeability: Product Misuse 402
Additional Decisions 404
C. Causation: Intervening and Supervening Cause 404
Additional Decisions 406
D. Failure to Warn Claims (Ohio Rev. Code § 2307.76(B) and Related Defenses 407
Additional Decisions 407
E. Negligence, Comparative Negligence and Assumption of the Risk: The Traditional Conduct Based Defenses 408
Additional Decisions 409
1. Comparative Negligence 409
a. Common Law Negligence Based Actions 409
b. Strict Liability and Product Liability Act Claims 409
c. Jury Verdict - Procedural Aspects 409
2. Assumption of the Risk 410
a. Generally 410
b. In the Workplace 410
c. Suppliers 411
d. Parent/Child 411
F. State of the Art/Safety History 412
Additional Decisions 413
1. State of the Art 413
2. Safety Record 414
G. The Seat Belt Defense 415
H. The Government Contractor Defense 415
III. DAMAGES *(Ohio Rev. Code § 2307.72 and Related Sections)* 416
A. Economic Loss (Ohio Rev. Code § 2307.79) 417
Additional Decisions 418
B. Emotional Distress 419
Additional Decisions 420
C. Punitive Damages (Ohio Rev. Code § 2307.80) 420
Additional Decisions 422

IV. CORPORATE CONCERNS 423
A. Successor Corporation Liability 423
Additional Decisions 424
B. Industry-Wide Liability 425
Additional Decisions 426
C. Component Manufacturers 428
Additional Decisions 430
D. Exceptions to Workers' Compensation Immunity 430
Additional Decisions 432
V. EXPERT WITNESSES AND EVIDENCE 434
A. Experts and Scientific Evidence 434
1. Qualification of the Expert Witness 435
2. Substantive Requirements 436
a. Certainty, Basis for Opinion, and Related Requirements 436
b. Reliability - Scientific Evidence a/k/a Galileo's Revenge and Tyco Brahe 438
Additional Decisions 440
Qualifications 440
Substantive Requirements 441
Reliability 442
B. Circumstantial Evidence (Ohio Rev. Code § 2307.73(B)) 443
Additional Decisions 444
C. Subsequent Remedial Measures 445
D. Spoliation 446
Additional Decisions 447
VI. OTHER CONCERNS 448
A. Choice of Law 448
Additional Decisions 449
B. Class Actions 450
Additional Decisions 453
VII. THE FUTURE AND CONCLUSION 453

INTRODUCTION

Although claims predicated on harm caused by defective products sounding in warranty and negligence, aided and abetted by the doctrine of *res ipsa loquitur,* existed well before the twentieth century, product liability as we now know it was initially foreshadowed in Ohio in the seminal case of *Rogers v. Toni*

Home Permanent Co.[2] Shortly after the true product liability revolution began,[3] Ohio joined the revolution with the adoption of strict liability in warranty without privity in *Lonzrick v. Republic Steel Corp.*[4] The Ohio Supreme Court then recognized that this approach to strict liability was no different from the more recognized concept of strict liability in tort and adopted this principle as enunciated in the Restatement of Torts.[5] The common law evolution of Ohio product liability law culminated with abandonment of the "unreasonably dangerous" requirement of the Restatement definition[6] and recognition that the doctrine of strict liability in tort encompassed crashworthiness or second collision liability.[7]

Enactment of the Ohio Product Liability Act (the "Act"),[8] which took effect on January 5, 1988, created an exclusive statutory basis for all tort based product liability claims.[9] The statute, while eliminating the term "strict liability in tort,"

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[2]167 Ohio St. 244, 147 N.E.2d 612 (1958), allowing an injured consumer to bring a direct action in warranty against the manufacturer despite the absence of privity. *Cf.* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916). [Note: Due to the nature of this article, parallel citations are provided for Ohio decisions.]

[3]The confluence of Greenman v. Yuba Power Prods. Inc., 377 P.2d 897 (Cal. 1962); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); and adoption of RESTATEMENT (SECOND) OF TORTS § 402A (1965) led to the national demise of the privity requirement and acceptance of the principles of strict liability in tort which had been forcefully urged in Justice Traynor's famous concurrence in Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944). Shortly thereafter, with adoption of the crashworthiness doctrine in Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), the foundation for modern product liability law was in place.

[4]6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

[5]Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

[6]Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 464-5, n.2, 432 N.E.2d 814, 817 n.2, *cert. denied,* 459 U.S. 857 (1982).

[7]Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

[8]OHIO REV. CODE §§ 2307.71-2307.80. For purposes of the Act, "Product" is defined as "any object, substance, mixture, or raw materials that constitutes tangible personal property" and meets other requirements as to ability to be delivered, commerce and trade. The term does not include human tissue, blood, or organs. OHIO REV. CODE § 2307.71(L). A vapor recovery system used to evacuate gasoline fumes from holding tanks was held to be tangible personal property within this statutory definition as distinct from a fixture which would have been beyond the Act's purview. Wireman v. Keneco Distributors, 75 Ohio St.3d 103, 661 N.E.2d 744 (1996). *Cf.* The "all things . . . which are moveable . . ." definition of "Goods" set forth in the Uniform Commercial Code, OHIO REV. CODE § 1302.01(8).

[9]The Ohio Product Liability Act does not bar actions based on contract law where there is privity between the seller and members of the buyer's family or household and guests. *See* OHIO REV. CODE § 1302.31, Bruns v. Cooper Indus. Inc., 78 Ohio App. 3d 428, 605 N.E.2d 395 (1992). In actions for economic loss between commercial parties that are in privity of contract, the Ohio Uniform Commercial Code provides the exclusive remedy. *See* Sun Refining & Mktg. Co. v. Crosby Valve & Gage Co., 68 Ohio St. 3d 397,

is primarily a codification of preexisting common law. The Act provides that product liability claims may be predicated on one of four theories: defects in manufacture or construction;[10] defects in design or formulation;[11] defect in warning or instruction,[12] and failure to conform to representation.[13] Each of these theories had previously been recognized by the courts. For example, the requirements for a cause of action predicated on a defect in design virtually mirror the former law of strict liability in tort. As with the former law, to prevail in a product liability claim the plaintiff must establish, by a preponderance of the evidence, the existence of a defect at the time the product left the control of the manufacturer and that the defect was a proximate cause of the harm for which recovery is sought.[14]

Since its adoption, efforts to amend the Act have been ongoing. The most recent effort would, among other things, apply comparative fault principles to product liability claims and provide a defense based on substance abuse.[15] In addition, preemptive federal legislation has been passed in both houses of Congress[16] which would, if enacted, have a significant effect upon Ohio product liability law.[17] The American Law Institute is now drafting a Restatement of Products Liability under the leadership of Co-Reporters James A. Henderson and Aaron D. Twerski. Drafts of several sections have been completed which, if adopted by the Institute, would represent a highly regarded source of new approaches to product liability law.[18] If Ohio accepts

627 N.E.2d 552 (1994); Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co., 42 Ohio St. 3d 40, 537 N.E.2d 624 (1989).

[10] OHIO REV. CODE § 2307.74.

[11] OHIO REV. CODE § 2307.75.

[12] OHIO REV. CODE § 2307.76.

[13] OHIO REV. CODE § 2307.77.

[14] OHIO REV. CODE §§ 2307.73, 2307.75(A).

[15] S.B. No. 148, H.B. No. 350, 121st Gen. Assembly, Regular Sess. (1995-96). These bills contain proposed amendments to the Ohio Revised Code including: §§ 2307.31 and 2307.32 (contribution and comparative fault allocation); § 2307.73 (limiting the use of circumstantial evidence and addressing market share liability as well as successor corporate liability); § 2307.75 (abolishing the consumer expectancy test); §§ 2315.19 and 2315.20 (comparative fault); § 2317.45 (abrogating the collateral benefits rule); § 2323.59 (substance abuse defense); and § 4513.263 (expanding the seat belt defense). A fuller description of the major legislative changes is set forth *infra* Part VII.

[16] H.R. 956, 104th Cong. 1st Sess. (1995); S. 565, 104th Cong. 1st Sess. (1995). This Act was passed by Congress and subsequently vetoed by President Clinton on May 2, 1996.

[17] The power of the federal government to enact such a statute and the constitutionality of the proposed national statute of repose are discussed in Stephen J. Werber, *The Constitutional Dimension of A National Products Liability Statute of Repose*, 40 VILL. L. REV. 985 (1995).

[18] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, Council Draft No. 3 (Nov. 15, 1995).

the premises of this new Restatement, through amendment of the Act, the effect on the state's law of product liability would be significant.

I. THE CAUSE OF ACTION

A. *Defects in Manufacture or Construction (Ohio Rev. Code § 2307.74)*

A defect in manufacture or construction can exist even if the manufacturer has "exercised all possible care."[19] This is consistent with the basic premise of preexisting law as fault is irrelevant to claims based on strict liability in tort. A product is defective, for purposes of this section, if two elements are met:

1. The product deviated in a material way from its manufacturer's design specifications, formula, or performance standards; and
2. The defect existed when the product left the control of its manufacturer.

These standards, though not fault based, reflect inadequate conduct on the part of a manufacturer. Nonconformance of the type required would be avoided by properly applied quality control standards. This section of the Act eliminates the consumer expectancy test for manufacture defect which had been judicially adopted. In *State Farm Fire & Casualty Co. v. Chrysler Corp.*,[20] the court reviewed its precedents to determine whether sufficient evidence of a defect existed to permit liability after a six-month old automobile caught fire. The decision appears to distinguish between the law applicable to manufacture defects and that applicable to design defects in that it adopts the consumer expectancy test for a manufacture defect. Thus, "a product may be proven to be in a defective condition if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[21]

Manufacture defect cases are relatively easy to prove, though expert testimony will often be needed to establish the non-compliance and/or the time the defect came into existence.[22] For example, automobile seat tracks are often welded to the chassis. Specifications will provide the number, size, spacing, and strength of the welds for each track. If a track breaks loose during a collision the failure can be categorized in one of three ways: (1) an unavoidable and nonactionable failure; (2) a manufacture defect; or (3) a design defect.[23] If the track separation resulted from fewer welds than specified or other failure to conform to the specifications, it is a manufacture flaw actionable under this section. A metallurgist would be needed to establish that the weld

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[19] OHIO REV. CODE § 2307.74.

[20] 37 Ohio St. 3d 1, 523 N.E.2d 489 (1988).

[21] *Id.* at 6, 523 N.E.2d at 493. The decision's analysis of circumstantial evidence and permissible inferences is set forth *infra* note 333 and accompanying text.

[22] Expert testimony is discussed *infra* Part V.

[23] Design defect is discussed *infra* Part I(B).

failure was caused by a manufacture defect rather than excessive force or prior damage to the weld. In some situations it may not be possible to determine whether the defect was of manufacture or design origin. In such cases an injured party can prevail by submitting sufficient evidence that one or the other had to exist and was the cause of harm.[24]

An early example of manufacture defect is found in *Lonzrick*.[25] Plaintiff, a structural iron worker, was injured when steel joists manufactured by the defendant collapsed and fell. The court affirmed the decision of the court of appeals which had overturned the trial court's ruling dismissing the action. No clear definition of defect was provided. Rather, the court spoke in warranty language of a product that was not merchantable or fit for its ordinary intended use. In closing, the court observed that there is liability for sale of a product which, if defective, "will be a dangerous instrumentality."[26]

More recently, a federal court applying Ohio law denied summary judgment because there was sufficient evidence of a material deviation from design specifications in the manufacture of an airplane engine.[27] The decision also addressed the element of proximate cause.

Even a properly designed and manufactured product can reflect a manufacture defect. In such cases the analogy to the implied warranty of fitness for a particular purpose is strong. Thus, where a manufacturer sent a chemical that did not comport with the buyer's specifications, a defect was present even though the chemical was properly manufactured.[28]

The requirement that the manufacture defect exist at the time of manufacture is not superfluous despite the fact that, by definition, this must be so. The failure to establish this factor can defeat an otherwise valid claim.[29] The requirement makes clear that subsequent unforeseeable modifications take the case beyond the purview of a manufacture defect. This requirement is more fully discussed below.

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[24] *See* Werlin v. B. & O.R.R., 32 Ohio App. 3d 14, 513 N.E.2d 353 (1987), where expert testimony supported the conclusion that a tractor drive shaft fractured because it was undersized (design) or had been improperly hardened (manufacture).

[25] 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

[26] *Id.* at 240, 218 N.E.2d at 194.

[27] In re Air Crash Disaster, 781 F. Supp. 1307 (N.D. Ill. 1992).

[28] Greenwood v. Alcan Aluminum Corp., No. 89CA004598, 1990 Ohio App. LEXIS 1503 (Lorain County Apr. 18, 1990).

[29] *See, e.g.*, Bruns v. Cooper Indus. Inc., 78 Ohio App. 3d 428, 433, 605 N.E.2d 395, 398 (1992); Phillips v. Wright Bernet, Inc., No. CA 93-01-010, 1993 Ohio App. LEXIS 2882 (Butler County June 7, 1993).

B. *Defects in Design or Formulation (Ohio Rev. Code § 2307.75)*

1. Defining Defect

Perhaps the most highly litigated and costly defect claims are those surrounding design defect allegations. Such claims bear on entire product lines and, if successful, force manufacturers to consider the need for recall campaigns and/or retrofitting, and design changes for future products.[30] A duty to inform government agencies may also be present. The wrong decision can yield government sanctions or imposition of punitive damages in subsequent litigation. Consistent with prior decisional law the Act provides that such defects exist if:

1. When it left the control of the manufacturer the foreseeable risks associated with the design exceeded the benefits of that design, or
2. The product is more dangerous than an ordinary consumer would expect when it is used in an intended or reasonably foreeseeable manner.

The first standard is generally described as risk/benefit analysis. The definition was previously adopted by the Ohio Supreme Court.[31] However, where the case law often allowed for a determination of defect to be made with benefit of hindsight, the Act abolishes the use of this approach. The second, alternative definition, known as the consumer expectancy test, was initially adopted in *Temple v. Wean United, Inc.*[32] as it represents the defect definition of the Restatement.[33] A product is defective in design if it fails either test. Neither definition requires that the design create a product that is "unreasonably dangerous," an element that was rejected in *Knitz v. Minster Machine Co.*[34] Both

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[30]Recalls can entail substantial financial costs and adverse public relations. Questions concerning the extent to which recall notification letters are admissible, and the extent of their relevance, have been addressed by a number of courts. *See generally* Lowe v. General Motors Corp., 624 F.2d 1373 (5th Cir. 1980); Barry v. Manglass, 389 N.Y.S.2d 870 (App. Div. 1976); Matsko v. Harley Davidson Motor Co., 473 A.2d 155 (Pa. Super. Ct. 1984).

There is a relative paucity of decisions applying Ohio law. The one published Ohio decision, Miles v. General Tire & Rubber Co., 10 Ohio App. 3d 186, 460 N.E.2d 1377 (1983), is of limited assistance as it is limited to a determination that the contents of the notification are inadmissible hearsay in regard to a party other than its sender. Federal courts in Ohio will be guided by decisions such as Anderson v. Whittaker Corp., 894 F.2d 804 (6th Cir. 1990); Bryan v. Emerson Elec. Co., 856 F.2d 192 (6th Cir. 1988); and Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984).

[31]*See* Cremeans v. International Harvester Co., 6 Ohio St. 3d 232, 452 N.E.2d 1281 (1983); Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 432 N.E.2d 814, *cert. denied*, 459 U.S. 857 (1982).

[32]50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

[33]RESTATEMENT (SECOND) OF TORTS (1965) § 402A cmt. i (1965).

[34]69 Ohio St. 2d 460, 432 N.E.2d 814, *cert. denied*, 459 U.S. 857 (1982).

are consistent with strict liability in tort which renders the degree of care utilized by the manufacturer irrelevant.[35]

Although analysis under the consumer expectancy standard is legally viewed as objective,[36] it is actually quite subjective, whereas analysis under risk-benefit is theoretically and actually objective. Despite the absence of a fault principle, a negligence calculus is implicit in consumer expectancy and express in risk-benefit which is no more than a refined application of a well known negligence formula.[37] Numerous cases have recognized and applied risk-benefit analysis.[38] The Act, consistent with prior law, provides a non-exclusive list of factors to consider when determining the degree of risk posed as well as the benefits associated with that design.[39] In addition, the judicially recognized concept of an unavoidably unsafe product is carried forward in the Act. Such products are not defective provided that adequate warning is given or unnecessary.[40]

An important aspect of the Act's provisions regarding design defect is set forth in Ohio Rev. Code section 2307.75(F). This section provides that a product is not defective in design or formulation if, at the time the product left the control of its manufacturer, a practical and technically feasible alternative design was not available. If a claimant cannot produce such evidence, the defense is entitled to judgment as a matter of law. The sole exception to this

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[35]RESTATEMENT § 402A (2)(a), provides that its liability rule applies although "the seller has exercised all possible care in the preparation and sale of his product." This principle has been part of Ohio decisional law since Temple and remains valid even though Ohio Rev. Code § 2307.75, unlike § 2307.74, contains no express language to this effect.

[36]For example, the Sixth Circuit has stated that whether a defect claim predicated on the consumer expectancy standard is applicable is for the jury to decide and that, if so, the test to be applied by that jury is "an objective one, to be examined with an eye toward the expectation of the 'ordinary consumer'. Birchfield v. International Harvester Co., 726 F.2d 1131, 1135-36 (6th Cir. 1984) (citations omitted).

[37]Judge Learned Hand, in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d. Cir. 1947), suggested that a party is liable for negligent conduct if the burden of adequate precaution to prevent the harm is less than the gravity of the resulting injury multiplied by the probability of harm.

[38]*See, e.g.*, Carrel v. Allied Prods. Corp., No. 9-94-24, 1995 Ohio App. LEXIS 3091 (Marion County July 11, 1995) (summary judgment in favor of a press manufacturer was affirmed with emphasis on the fact that there was no "foreseeable risk" as the press had not caused injury for a twenty year period despite the absence of certain safety devices); Gilbert v. Bayerische Motoren Werke, A.G., No. 13819, 1993 Ohio App. LEXIS 5966 (Montgomery County Dec. 17, 1993) (plaintiff had established a prima facie case, through expert testimony, showing that the risks inherent in a vehicle windshield retention system outweighed its benefits).

[39]OHIO REV. CODE § 2307.75(B) and (C).

[40]OHIO REV. CODE § 2307.76 (B) and (C). These provisions are discussed *infra* Part I(C).

non-defect rule is that there can be liability if the manufacturer acted unreasonably in introducing the product into trade or commerce.[41]

2. Subsequent Modification/Alteration

By 1977, with the adoption of the Restatement definition of strict liability in tort, it was clear that to prevail a plaintiff had to establish that the product reached the consumer or user "without substantial change in the condition in which it [was] sold."[42] In cases where this burden could not be met a motion for summary judgment would often be granted. The Act carries forward this concept, but only as part of the calculus for determination of whether a defect exists.[43] To the extent that an unforeseeable or unreasonable modification or alteration is viewed as breaking the chain of proximate causation, it will remain a full defense. To the extent that the change is insufficient to break this chain, it will be viewed only as a factor. Moreover, if the type of change delineated in this section of the Act exists, it could make it impossible for the plaintiff to establish that the defect existed when the product "left the control of its manufacturer."[44] Despite the change made by the Act, case outcome will rarely, if ever, be affected.

The alteration requirement was fully discussed in *Temple* and its reasoning remains valid. This case involved a power punch press which, when sold, had vertical dual activating buttons at shoulder height. A purchaser of the press altered this system by installing horizontal face up activating buttons at waist level which were twenty-four inches apart. When a piece of stock fell upon the buttons the press was inadvertently activated and caused the injury to plaintiff. Absent the modification this activation could not have occurred. The court held that the installation of waist high activation buttons was a "substantial change" in a unit that contained no original defect.[45]

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[41] OHIO REV. CODE § 2307.75(F).

[42] RESTATEMENT (SECOND) OF TORTS § 402A (1)(b) as adopted in Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977). The court adopted section 402A and its comments in their entirety.

[43] OHIO REV. CODE § 2307.75(B) specifies the factors to be considered in making a determination of foreseeable risk. Sub-paragraph (B)(1) then states as one of these factors:

> The nature and magnitude of the risks of harm associated with that design or formulation in light of the intended and reasonably foreseeable use, modifications, or alterations of the product.

Similar language is contained in sub-paragraph (B)(3), addressing the likelihood of harm.

[44] OHIO REV. CODE § 2307.75(A)(1).

[45] A claim against the manufacturer of the installed operating buttons was also dismissed as this component supplier had no knowledge that its components "were to be fashioned or fabricated into the power press in the particular manner that they were." Temple, 50 Ohio St. 2d at 324-25, 364 N.E.2d at 272. Liability of component part suppliers is more fully discussed *infra* Part IV(C).

Additional Decisions

Kobza v. General Motors Corp.[46] Alteration of an automobile transmission linkage system is a material alteration even though the system was removable after it left control of the manufacturer. Any change which increases the likelihood of a malfunction which is the proximate cause of injury is a substantial change. Where the change was neither expected nor intended by the manufacturer, a directed verdict is appropriate.

King v. K. R. Wilson Co.[47] Summary judgment in favor of a manufacturer was upheld where the activation system of a die cast trim machine was modified in a manner found to be a substantial alteration and plaintiff failed to provide sufficient evidence that such a change was foreseeable.

Love v. Mack Trucks, Inc.[48] Directed verdict in favor of manufacturer upheld where plaintiff's injuries were caused by the failure of a fifth wheel which was installed subsequent to manufacture and sale as a means to join a tractor and trailer rig. The installation contradicted warnings about the installation of a fifth wheel. There was no evidence that the tractor was defective when it left the control of its manufacturer.

Behanan v. Desco Distribution Co.[49] Press machine manufacturer granted summary judgment where a safety device, installed at the time of delivery, had been disabled. Under these circumstances plaintiff failed to show that he was entitled to compensatory damages pursuant to Ohio Revised Code section 2307.73.

Cox v. Oliver Machine Co.[50] Directed verdict properly denied where manufacturer could foresee a subsequent alteration due to its knowledge that the owner could repair and maintain the saw.

C. *Defects in Warning or Instructions (Ohio Rev. Code § 2307.76)*

Through the 1980s warning claims were generally viewed as affirmative defenses to strict liability actions rather than as a cause of action in strict liability.[51] This approach was invalidated in *Crislip v. TCH Liquidating Co.*,[52]

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[46] 68 Ohio App. 3d 742, 580 N.E.2d 47 (1989).

[47] 8 Ohio St. 3d 9, 455 N.E.2d 1282 (1983).

[48] 27 Ohio App. 3d 198, 500 N.E.2d 328 (1985).

[49] 98 Ohio App. 3d 23, 647 N.E.2d 830 (1994). The relationship between product misuse/abuse and alteration is not clearly delineated. The wedging of a piece of cardboard into the machine to defeat the safety feature in Behanan could have been described as an unforeseeable misuse. *See also* Burrows v. Fastener Eng'rs, Inc., 78 Ohio App. 3d 388, 604 N.E.2d 838 (1992) (removal of safety guard unforseeable even though designed to be moved); Stombaugh v. National Lime & Stone Co., No. 16-89-18, 1991 Ohio App. LEXIS 127 (Wyandot County Jan. 15, 1991) (disconnection of air compressor's electrical shut-down system).

[50] 41 Ohio App. 3d 28, 534 N.E.2d 855 (1987).

[51] *See, e.g.*, Overbee v. Van Waters & Rogers, 706 F.2d 768 (6th Cir. 1983).

which recognized a strict liability in tort failure to warn claim as an alternative to a negligence based claim. The court took the approach previously announced in *Krosky v. Ohio Edison Co.*[53] The *Crislip* court held:

> In a products liability case where a claimant seeks recovery for failure to warn or warn adequately, it must be proven that the manufacturer knew, or should have known, in the exercise of reasonable care, of the risk or hazard about which it failed to warn. Further, there will be no liability unless it be shown that the manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public. Thus, *the standard imposed upon the defendant in a strict liability claim grounded upon inadequate warning is the same as that imposed in a negligence claim . . . .*[54]

The primary reason for adopting the doctrine was to avoid application of comparative negligence principles.

This claim, both at common law and under the Act, is patterned on, and follows, Restatement of Torts (Second) section 402A, Comment j. The claim applies to both warnings and instructions. A warning is provided to alert users to particular dangers of a product when used in an intended or foreseeable manner. An instruction advises a user as to the proper manner in which to use the product. Due to their relative simplicity and low cost, a substantial number of failure to warn claims have been brought.

The principles were codified in Ohio Rev. Code section 2307.76 which provides for a cause of action without regard to strict liability or negligence labels (but without application of comparative negligence), based upon the following:

1. Products can be defective due to inadequate warnings or instructions if, when the product left the control of the manufacturer:
   a. the manufacturer knew or, in the exercise of reasonable care, should have known of a risk; and
   b. the manufacturer failed to provide warning or instruction that a reasonable manufacturer would have provided in light of the likelihood of harm and the seriousness of that harm.
2. Similar liability is imposed for failure to provide a post-marketing warning or instruction where the

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[52] 52 Ohio St. 3d 251, 556 N.E.2d 1177 (1990). Section 2307.76 was utilized to support a failure to warn claim against the original installer and subsequent seller of a gasoline storage plant where vapors entered an empty tank resulting in an explosion that led to the death of plaintiff's decedent. Wireman v. Keneco Distributors, 75 Ohio St.3d 103, 661 N.E.2d 744 (1996).

[53] 20 Ohio App. 3d 10, 484 N.E.2d 704 (1984).

[54] 52 Ohio St. 3d at 257, 556 N.E.2d at 1182-83 (emphasis added, citations omitted).

manufacturer learns of, or in the exercise of reasonable care should learn of, a risk of harm associated with the product.
3. A product is not defective for failure to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge.
4. A special provision is made in regard to ethical drugs which incorporates the learned intermediary defense.[55]
5. The failure to warn or instruct must be a proximate cause of the alleged injury.

In order to meet the duty to provide an adequate warning or instruction, the manufacturer must be sure that its warnings/instructions meet the following norms:

1. Specificity: identification of the precise danger and harm - a general "may be harmful" is inadequate.
2. Clarity: the language must be clear and understandable to the reasonable person.
3. Conspicuousness: the warning must be set forth in a place and manner which will call the users' attention to it. This can be done by use of bold print, colors, etc.[56]
4. Avoidability: instruction as to how the danger can be prevented, if this is possible, must be provided.
5. Audience: subject to exceptions, the warning must be designed to reach the end user.

In appropriate cases the use of pictures or symbols should be considered. The level of hazard must also be indicated. "Danger" is used to describe the most serious hazard level; "Warning" is used to show that serious injury or death could result; and "Caution" is used to illustrate lesser injury potential. Quite often the color red is associated with "Danger" and yellow with "Caution." Unless mandated by applicable regulation, there is no color code.

The clearest decisions regarding how a warning must be presented to meet the duty are *Crislip* and *Freas v. Prater Construction Corp.*[57] In *Crislip*, despite fairly detailed instructions and warnings, a cause of action was stated as there was no indication that venting of the add-on furnace should not utilize the same flue as the gas heater nor was there an indication that improper venting could lead to asphyxiation. In *Freas*, multiple warnings and instructions regarding the dangers of dismantling a crane improperly were sufficient. The court emphasized the manual's clear instruction that incorrect boom removal could result in personal injury or death, that no one should ever stand under

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[55]*See* Tracy v. Merrell Dow Pharmaceuticals, 58 Ohio St. 3d 147, 569 N.E.2d 875 (1991).

[56]*Cf.* U.C.C. disclaimer and limitation of liability rules. OHIO REV. CODE §§ 1302.29 and 1302.93.

[57]60 Ohio St. 3d 6, 573 N.E.2d 27 (1991). *See also* Seley v. G.D. Searle & Co., 67 Ohio St. 2d 192, 423 N.E.2d 831 (1981).

the boom when removing the bolts, and that eight boldface warnings were provided with each preceded by an exclamation mark *e.g.*, "CAUTION: Incorrect boom removal or disassembly may result in machine damage, personal injury or death. *Never allow anyone . . . to stand on, in, or under the boom when removing splice bolts or connecting pins.*"[58] The court observed that "[A]ll warnings . . . appear in bold-face type and are highlighted by a white exclamation mark in a dark triangle,"[59] and that "[t]he warnings are *readable, conspicuous, and understandable.*"[60]

Additional Decisions

1. Defective when Left Control of Manufacturer (Ohio Rev. Code § 2307.76(A)(1)):

Phillips v. Wright Bernet, Inc.[61] Danger of operating a brush flagging machine with brushes that were not flat and rectangular was not foreseeable at time of manufacture in 1965 (injury in 1990).

2. Failure to Warn or Instruct (Ohio Rev. Code section 2307.76(A)(1)):

Leibreich v. A.J. Refrigeration, Inc.[62] Party that designed and assembled final product, as distinct from the manufacturer of the non-defective component parts, could be liable for failure to warn.

Sapp v. Stoney-Ridge Truck Tire.[63] Tire manufacturer not required to warn of all potential abuse and misuse of its product.

Kelly v. Cairns & Bros., Inc.[64] Fire helmet manufacturer under no duty to warn of additional protective accessories.

3. Post-Market Failure (Ohio Rev. Code § 2307.76(A)(2))

Flaugher v. Cone Automatic Machine Co.[65] Filing of a similar suit five weeks earlier was insufficient notice to establish post-market liability.

[58] 60 Ohio St. 3d at 10, 573 N.E.2d at 31.

[59] *Id.* at 7, 573 N.E.2d at 29.

[60] *Id.* at 10, 573 N.E.2d at 31.

[61] No. CA93-01-010, 1993 Ohio App. LEXIS 2882 (Butler County June 7, 1993).

[62] 67 Ohio St. 3d 266, 617 N.E.2d 1068 (1993) (parking brake). Liability of component part suppliers/manufacturers is more fully discussed *infra* Part IV(C).

[63] 86 Ohio App. 3d 85, 619 N.E.2d 1172 (1993).

[64] 89 Ohio App. 3d 598, 626 N.E.2d 986 (1993).

[65] 30 Ohio St. 3d 60, 507 N.E.2d 331 (1987). The primary focus of this decision concerns corporate successor liability which is discussed *infra* Part IV(A).

4. Preemption

Federal law in many product areas provides standards for warnings which may preempt state law. Numerous decisions have addressed this and related safety standard issues.[66] A recent appellate decision[67] ruled that federal law does not bar a design defect claim based on the failure of an automobile manufacturer to install a passenger-side air bag in a 1987 automobile even though the vehicle complied with Federal Motor Vehicle Safety Standard No. 208, which did not require this restraint system.

D. The Unavoidably Unsafe Product (Ohio Rev. Code § 2307.75)

By virtue of their inherent characteristics, certain products present dangers of harm which cannot be designed out of the product. Such a product may be marketed and found non-defective provided that it is properly prepared and accompanied by an adequate warning.[68] This principle is summarized in the Restatement of Torts (Second) section 402(A), comment k, which focuses on products which, in the present state of human knowledge, are incapable of being made safe for their intended use. When in compliance with these standards, such products are not defective. Though often applied to drugs and vaccines, this doctrine is applicable to any product with such inherent danger potential.

Ohio Revised Code section 2307.71(P) defines unavoidably unsafe to mean "in the state of technical, scientific, and medical knowledge at the time a product in question left the control of its manufacturer, an aspect of that product was incapable of being made safe." This definition applies to all products within the purview of the Act and clearly establishes the time frame reference point.

This general definition must be read in conjunction with the specific definition provided in regard to products which are allegedly defective in design or formulation. Ohio Revised Code section 2307.75(E) provides that a product is not defective in design or formulation if the harm was caused by "an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with

[66] *See generally* Medtronic, Inc. v. Lohr, 64 U.S.L.W. 4625 (U.S. June 26, 1996); Freightliner Corp. v. Ben Myrick, 115 S. Ct. 1483 (1995); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Jacobs v. E.I. Du Pont De Nemours & Co., 67 F.3d 1219 (6th Cir. 1995); Jenkins v. James B. Day & Co., 69 Ohio St. 3d 541, 634 N.E.2d 998 (1994); In re Miamisburg Train Derailment Litig., 68 Ohio St. 3d 255, 626 N.E.2d 85, *cert. denied*, Union Tank Car Co. v. Various Plaintiffs in Class, 115 S. Ct. 59 (1994).

[67] Nelson v. Ford Motor Co., No. 94-L-106, 1995 Ohio App. LEXIS 5722 (Lake County Dec. 22, 1995).

[68] An exception may arise where the utility of the product is so low, in comparison to the degree of danger created, as to make Ohio Rev. Code § 2307.75(F), applicable.

the ordinary knowledge common to the community." This definition incorporates aspects of risk/benefit analysis and consumer expectancy.

Although the definition of the term "unavoidably unsafe" has general application, the only statutory application is set forth in Ohio Revised Code section 2307.75(D). This section provides that ethical drugs or ethical medical devices[69] are not defective because some aspect is unavoidably unsafe if its manufacturer provides adequate warning and instruction as set forth in Ohio Revised Code section 2307.76.[70]

Additional Decisions

Seley v. G.D. Searle & Co.[71] This seminal decision interprets and applies Comment k to the oral contraceptive, Ovulen, an unavoidably unsafe ethical medicine. Consistent with the subsequent Act, Syllabus 1 provides:

> A manufacturer of an unavoidably unsafe ethical (prescription) drug is not strictly liable in tort to a consumer who has suffered injury as a result of ingesting that drug where the manufacturer has provided adequate warning to the medical profession of all potential adverse reactions inherent in the use of the drug which the manufacturer, being held to the standards of an expert in the field, knew or should have known to exist at the time of marketing.[72]

Syllabus 5 provides that the duty to warn is satisfied "by providing adequate warnings to the medical profession and not to the ultimate user."[73]

Renfro v. Black.[74] Due to alleged malpractice, a drug, chymodiactin, leaked into plaintiff's intrathecal space causing nerve damage. Paraplegia followed the ensuing surgery. There is no indication that the drug was unavoidably unsafe, but this is a logical assumption. Plaintiff asserted that a manufacturer's warning sent to the doctor shortly before the surgery was inadequate as "it was

[69] An ethical drug means a prescription drug prescribed or dispensed by a physician or other authorized person. OHIO REV. CODE § 2307.71(D). An ethical medical device is a medical device prescribed, dispensed, or implanted by a physician or other authorized person. OHIO REV. CODE § 2307.71(E).

[70] An alternative defense to manufacturers of ethical drugs, as distinct from ethical medical devices, the learned intermediary doctrine, is set forth in Ohio Rev. Code § 2307.76(C).

[71] 67 Ohio St. 2d 192, 423 N.E.2d 831 (1981).

[72] *Id.* at 423 N.E.2d at 834.

[73] Warning must be given to the ultimate consumer if applicable regulations of the F.D.A. so provide. In Seley, a voluntary warning was provided to the plaintiff. The court held that the adequacy of this warning, under the "voluntary duty" doctrine, was not relevant if adequate warning was provided to the physician. This exception would not apply to situations in which a warning to the consumer is required by law.

[74] 52 Ohio St. 3d 27, 556 N.E.2d 150 (1990).

unduly delayed, reluctant in tone or lacking in a sense of urgency."[75] Though this is an accurate statement of law, the trial court's refusal to instruct the jury accordingly was not an abuse of discretion as the delay in issuing the warning was not a cause of the harm sustained.

White v. Wyeth Laboratories, Inc.[76] Whether a product is unavoidably unsafe is to be determined on a case by case basis, not merely because it is a drug, vaccine, or other product. DTP, properly prepared, is an unavoidably unsafe product rendered non-defective by virtue of an adequate warning. Plaintiff's claim that this product was not unavoidably unsafe due to the possible use of a less dangerous vaccine was rejected. The alternative vaccine proposed by plaintiff was not approved by the FDA and there was no evidence that such a vaccine could have been marketed at the relevant time.

Burwell v. American Edwards Laboratories.[77] Spontaneous degeneration of porcine heart valve is unavoidable thereby rendering the valve unavoidably unsafe. It was proper to instruct the jury on the law of unavoidably unsafe products rather than the consumer expectancy test.[78]

E. *Defect by Failure to Conform to Representation (Ohio Rev. Code § 2307.77)*

This claim can be brought without regard to whether the representation was fraudulently, negligently, or recklessly made. It requires only that the product, when it left the control of its manufacturer, failed to conform to a representation made by that manufacturer. This provision negates the common law requirement of fault for misrepresentation actions and parallels aspects of traditional express warranty by affirmation or promise.[79] As in commercial law, the representation becomes a basis of the bargain, but other technical requirements of warranty law are inapplicable. Actionable representations can be made through advertising, as part of an owner's manual, by oral statement of an agent, or in other forms.

Plaintiff's recovery in the well known *Rogers* decision was predicated on a representation that the hair care product was safe and harmless. To prevail in such an action under the Act the plaintiff must establish: (1) that the representation was of a material fact concerning the quality or character of the

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[75]*Id.* at 30, 556 N.E.2d at 153, relying on Seley, 67 Ohio St. 2d at 198, 423 N.E.2d at 837.

[76]40 Ohio St.3d 390, 533 N.E.2d 748 (1988). *Accord* Ackley v. Wyeth Lab., Inc., 919 F.2d 397 (6th Cir. 1990) (applying Ohio law to find vaccine unavoidably unsafe, that warning was adequate, and finding that no safer alternative vaccine could be legally marketed).

[77]62 Ohio App. 3d 73, 574 N.E.2d 1094 (1989).

[78]*See also* Blatt v. Hamilton, No. 85AP-835, 1986 WL 2925 (Ohio Ct. App. Franklin County, Mar. 6, 1986) (prescription acne medicine held non-defective due to an adequate warning as to side effects); Layne v. GAF Corp., 42 Ohio Misc. 2d 19, 537 N.E.2d 252 (C.P. 1988) (jury charge on unavoidably unsafe products in an asbestos action).

[79]*Cf.* OHIO REV. CODE § 1302.26.

product; (2) nonconformance with that representation; (3) justifiable reliance upon the representation; and (4) proximate cause.[80]

Additional Decisions

Leichtamer v. American Motors Corp.[81] Advertising representations as to a jeep's off-road handling characteristics and the physical appearance of its "roll-bar" contributed to a conclusion that it was not crashworthy and to an award of punitive damages.

Jordan v. Paccar, Inc.[82] A manufacturer's statements as to the strength of a truck cab fiberglass roof were deemed mere puffing beyond the purview of Ohio Revised Code section 2307.77.

Tittle v. Rent-A-Wreck, Division of Marhefka Chevrolet, Buick, Inc.[83] Summary judgment found improper where a vehicle lessor told plaintiff that the vehicle "drove good" and could be driven, after plaintiff had complained of defective steering. The decision was based on Ohio Revised Code section 2307.78.

F. *Crashworthiness/Second Collision/Enhanced Injury Liability*

Following the ground breaking decision in *Larsen v. General Motors Corp.*,[84] the common law of crashworthiness or second collision liability swept the nation. The doctrine imposes liability upon product manufacturers for injurious consequences of collisions without regard to whether a product defect caused the collision. The principle imposes liability for injuries that were either (a) not prevented, or (b) enhanced by a design or manufacture defect in the product which came into play after the initial collision.[85]

The term crashworthiness references the principle that a manufacturer is obligated to provide a product that is reasonably safe in collision sequences. There is a duty to design and manufacture a product that will provide reasonable protection against collision related injuries. The term "second

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[80]Gawloski v. Miller Brewing Co., 96 Ohio App. 3d 160, 644 N.E.2d 731 (1994) (reliance was not reasonable as advertising did not negate the known dangers of alcohol). The elements set forth in Gawloski are consistent with the definition of representation set forth in Ohio Rev. Code § 2307.71(N) which provides that representation means "an express representation of a material fact concerning the character, quality, or safety of a product."

[81]67 Ohio St. 2d 456, 424 N.E.2d 568 (1981). This decision was not based on nonconformity as a defect, but is illustrative of the impact representations can have upon case outcome.

[82]37 F.3d 1181 (6th Cir. 1994).

[83]No. 92-B-51, 1993 Ohio App. LEXIS 4563 (Belmont County Sept. 24, 1993).

[84]391 F.2d 495 (8th Cir. 1968).

[85]Though often involving passenger automobiles, the doctrine encompasses many other products such as construction equipment, recreational vehicles, airplanes, tractors and other agricultural equipment, and riding mowers. The list is limited only by imagination and the facts.

collision" references the fact that in a collision sequence there is a first collision between the product and something else and a second collision between the occupants of that product and either the product (such as a vehicle interior), or something else (such as the ground in an ejection case). The doctrine imposes liability for harm caused by that second collision. No second collision, as such, is needed to make a prima facie crashworthiness claim. If the injured party can point to a defect which failed to prevent injury, or enhanced injury, in the accident circumstances, the initial elements of the prima facie case have been made (for example, injuries caused by fire due to impact related fuel system failure).

The Ohio Supreme Court first recognized the principle of crashworthiness under the doctrine of strict liability in tort in *Leichtamer v. American Motors Corp.*.[86] The decision was soon followed in *Sours v. General Motors Corp.*.[87] Both cases involved a roll-over accident sequence, although in *Leichtamer* it was actually a pitch-over. In *Leichtamer*, the court provided a general description of the crashworthiness doctrine:

> While a manufacturer is under no obligation to design a "crash proof" vehicle, an instruction may be given on the issues of strict liability in tort if the plaintiff adduces sufficient evidence that an unreasonably dangerous product design proximately caused or enhanced plaintiff's injuries in the course of a foreseeable use.[88]

No section of the Ohio Revised Code specifically addresses crashworthiness claims. However, the Act's definitions of design and manufacture defect,[89] as well as other general provisions, are applicable.

Additional Decisions

1. Application of the Principle

Simpkins v. Starkey.[90] Plaintiff was in her stopped automobile, waiting to turn, when her vehicle was struck by another vehicle. She was wearing a lap and shoulder belt and claimed injury because the belt permitted her to move

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[86] 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (roll-bar defect).

[87] 717 F.2d 1511 (6th Cir. 1983) (automobile roof support).

[88] 67 Ohio St. 2d at 465, 424 N.E.2d at 575-76 (citations omitted). Other early decisions include Anton v. Ford Motor Co., 400 F. Supp. 1270 (S.D. Ohio 1975) (applying risk/benefit analysis); and Goodson v. McDonough Power Equip., No. 80-CA-34, 1981 WL 2886 (Ohio Ct. App. Miami County Aug. 18, 1981), *rev'd on other grounds*, 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983) (enhanced injury resulting from foreseeable though unintended use of a lawn mower). The Supreme Court decision provides a comprehensive analysis of collateral estoppel principles, but does not address any aspect of enhanced injury litigation.

[89] OHIO REV. CODE §§ 2307.74 and 2307.75.

[90] No. C-860274, 1987 WL 8420 (Ohio Ct. App. Hamilton County, Mar. 25, 1987).

forward before it locked. She did not strike the vehicle interior. The court affirmed a directed verdict for General Motors by finding that under any definition of defect, the plaintiff had failed to make a prima facie case.

Kitchens v. McKay.[91] Plaintiff brought a crashworthiness action against Volkswagen for injuries sustained when the front end of a VW collapsed in a two car accident. The trial court ruled that plaintiff's expert witness was not qualified. This ruling led to a directed verdict in favor of Volkswagen. The precluded testimony would have identified three alleged defects. In affirming the directed verdict, the court recognized that the complaint sounded in strict liability directed toward the crashworthiness of the vehicle and defects which enhanced or increased plaintiff's injuries as specified in *Leichtamer.*

Gilbert v. Bayerische Motoren Werke, A.G.[92] This decision provides what may be the most explicit recent discussion of crashworthiness issues despite the fact that the principle is never cited. The court treats this crashworthiness case in a manner identical to any other design defect action.

Plaintiff's BMW broke down and was at the side of the highway while being serviced by a tow truck operator. Plaintiff was behind the wheel trying to start the car, following instructions of the tow truck operator, when the BMW was struck from behind. Due to impact deformation the windshield was dislodged and the raised hood was pushed rearward invading the driver compartment through the space vacated by the dislodged windshield. Plaintiff was struck as he was moving forward due to the impact and sustained serious brain damage. The trial court's directed verdict in favor of BMW was reversed.

The court recognized that a products liability claim based on design defect requires (1) a defect which existed at time of manufacture, which (2) is the direct and proximate cause of injury. The court properly held that in crashworthiness cases the defect must be *the* cause of harm rather than *a* cause of harm as in other products liability claims.[93]

The court held that to meet the burden of proof in establishing a design defect claim, the plaintiff had to present evidence to establish foreseeability without benefit of hindsight. Plaintiff then had to adduce evidence as to the existence of a defect (through a calculus of product utility, feasibility of alternative design, and magnitude of foreseeable risk). These proofs were mandated by Ohio Revised Code section 2307.75. Sufficient expert evidence was provided on each point as to make a prima facie case showing that the windshield retention system was defective, relating this to the injury, and showing that other retention systems were feasible. The court also found that the accident circumstances were sufficiently foreseeable despite the limitations described in *Menifee v. Ohio Welding Products, Inc.*,[94] and other decisions.

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[91] 38 Ohio App. 3d 165, 528 N.E.2d 603 (1987).

[92] No. 13819, 1993 Ohio App. LEXIS 5966 (Montgomery County Dec. 17, 1993).

[93] *Cf.* OHIO REV. CODE § 2307.73(A)(2).

[94] 15 Ohio St. 3d 75, 472 N.E.2d 707 (1984).

2. Burden of Proof

One of the most difficult questions in the area of crashworthiness litigation is the division of the burden of proof.[95] Courts have taken differing positions as to whether the plaintiff is obligated to establish the extent of the enhanced injuries and what those injuries would have been absent the alleged defect or with an alternative protective design, or whether the defendant is obligated to establish the absence of such injuries. Plaintiff also must establish that any dangers created by the alternative design are less significant than those of the challenged design.

The best authority in Ohio remains the statement in *Leichtamer* that "[i]n order to recover, the plaintiff must prove by a preponderance of the evidence that the enhancement of the injuries was proximately caused by a defective product unreasonably dangerous to the plaintiff [consumer]."[96] Ohio law places the burden of proof on plaintiff. This approach, though not universally followed, is consistent with the principle of law and traditional norms of pleading and practice.

Relying on the *Leichtamer* standard, the court in *Simpkins* held that plaintiff's personal testimony was inadequate to establish a defect under the consumer expectancy standard.[97] She admitted reading the vehicle owner's manual which specified that the system would lessen the chance of injury, but it did not state that the seat belts would prevent injury. The seat belt system prevented plaintiff from striking the vehicle interior. The court found that not only did the belt perform in a manner consistent with plaintiff's subjective expectancy, but also that it met the reasonable expectations of any ordinary consumer. Plaintiff's expert recognized the unreeling aspect of the belt design, but failed to indicate that the design would likely cause injury or present a serious danger. Nor did the testimony establish that other designs were economically or mechanically more feasible. Thus, the evidence did not support a defect finding pursuant to risk/benefit analysis. Similar reasoning was applied in *Kitchens*.

Gilbert provides an excellent example of the type of expert testimony needed to establish plaintiff's prima facie case. Though making clear that the burden of proof remains on plaintiff, the court limited the extent of this burden in regard to the foreseeability element. The court rejected the defense claim that the exact circumstances of this accident could not be foreseen. The question is only whether the actual harm falls within the general field of danger which should have been anticipated by the manufacturer. Plaintiff need not prove that the exact sequence of events was foreseeable; only that the defendant, based

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[95]Similar issues arise in the converse situation created by recognition of the "seat belt" defense. These issues are discussed *infra* Part II(C).

[96]67 Ohio St. 2d at 467, 424 N.E.2d at 577. The "unreasonably dangerous" requirement was subsequently abandoned in Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, n.2 at 464-5, 432 N.E.2d 814, n.2 at 817. Defective design is defined in Ohio Rev. Code 2307.75 without reference to "unreasonable danger."

[97]*See supra* note 90.

on the attention, perception, memory, knowledge, and intelligence of a reasonable automobile manufacturer, should have anticipated the general danger posed by its chosen design.

II. DEFENSES

The best defense is, of course, to establish that the product was defect free. Of equal importance, in many cases, is evidence that a given defect was not a proximate cause of the injury for which recovery is sought. In a real sense these defenses simply assert that the plaintiff has failed to meet the applicable burden of proof. In addition, defenses which can be asserted as "affirmative defenses," and for which the defense bears the burden of proof, are often available and effective. The primary affirmative defenses are discussed below.[98]

A. The Statute of Limitations

Product liability claims are governed by the two year provision of Ohio Revised Code section 2305.10 generally applicable to personal injury actions. Subsequent to the effective date of the Act, which does not contain a statute of limitations, a claim was made that suits brought pursuant to the Act should be governed by the six year provision of Ohio Revised Code section 2305.07, statutory causes of action. This question was resolved in favor of the two year statute in *McAuliffe v. Western States Import Co.*[99]

Product caused diseases or effects often have long latency periods so that symptoms do not manifest within two years of exposure. Therefore, a discovery rule was added to Ohio Revised Code section 2305.10 which extended the time to file an action until such time as the relationship between product exposure and disease or effect was known or, by the exercise of reasonable diligence should have been known. This statutory extension was also judicially created so that it could apply to claims which preceded the statutory enactment.[100] Since its initial creation the discovery rule provision has been amended several times to broaden its scope. The Ohio Supreme Court and lower courts have reviewed the rule on a number of occasions.[101]

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[98] This article does not address defenses premised upon the Rules of Civil Procedure such as Rule 17(A) (Real Party in Interest), Rules 18-21 (Joinder), or Jurisdiction and Service of Process such as Rule 4.3 and 4.5 (Out of State Service and Service in a Foreign Country).

[99] 72 Ohio St. 3d 534, 651 N.E.2d 957 (1995); *followed* Gates v. Precision Post Co., 74 Ohio St.3d 439, 659 N.E.2d 1241 (1996). Commercial loss property damages, other than to the product itself, if outside the contract are controlled by Ohio Rev. Code § 2305.10 for personal property and Ohio Rev. Code § 2305.09(D) for real property. If within the contract such claims are governed by Ohio Rev. Code § 1302.98. Sun Refining & Mktg. Co. v. Crosby Valve & Gage Co., 68 Ohio St. 3d 397, 627 N.E.2d 552 (1994).

[100] O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983).

[101] *See, e.g.*, NCR Corp. v. United States Mineral Prods. Co., 72 Ohio St. 3d 269, 649 N.E.2d 175 (1995) (common law rule extended to include cost of asbestos removal without personal injury); Liddell v. SCA Servs., 70 Ohio St. 3d 6, 635 N.E.2d 1233 (1994)

An exception to application of the personal injury statute is found in Ohio Revised Code section 2125.02(D), which provides that all wrongful death actions must be commenced within two years from date of death. This provision applies to product liability claims. This is a significant exception as the discovery rule is inapplicable to wrongful death actions. Since this two year period conditions the right to bring suit, and contains no discovery rule, actions for wrongful death must be brought within this time frame.[102] This bar applies even if there was no knowledge, or where the exercise of reasonable diligence would not have revealed, that the death was caused by a defective product to which the decedent was exposed more than two years earlier.[103] Similarly, a survival action, the claim of the deceased for personal injury prior to death, must be brought within two years of the date of death as the last day on which the claim could possibly accrue is the date of death.[104]

Once an action has been filed within the statutory period it can, in effect, be extended by amending a timely filed complaint to designate additional defendants or claims after the statutory period has expired.[105] There are, however, limits to the ability to extend the statutory period in this way. The

(effects of chlorine gas); Burgess v. Eli Lilly & Co., 66 Ohio St. 3d 59, 609 N.E.2d 140 (1993) (discovery rule of Ohio Rev. Code § 2305.10 unconstitutional as predicated on the possibility that one "may" have an injury and redefining the rule to be based on a "should" have known standard); Columbus Bd. of Educ. v. Armstrong World Indus., 89 Ohio App. 3d 846, 627 N.E.2d 1033 (1993) (cause of action accrues, for purposes of discovery rule, when asbestos abatement procedure commenced based on knowledge of health hazard, rather than when aware of possible danger). *Cf.* Holmes v. Community College, 97 Ohio App. 3d 678, 647 N.E.2d 498, 502 (1994) (suggesting that the rule is inapplicable to injury sustained by electric shock with immediate physical injury even though the complained of heart injury did not manifest at that time and finding that, in any event, plaintiff should have known of the condition more than two years prior to filing).

[102] The commencement period is constitutionally valid. Because the right to bring a wrongful death action is legislatively created, the legislature has the authority to limit the right as it believes appropriate. Shover v. Cordis Corp., 61 Ohio St. 3d 213, 574 N.E.2d 457 (1991); Keaton v. Ribbeck, 58 Ohio St. 2d 443, 391 N.E.2d 307 (1979). *See also* Burris v. Romaker, 71 Ohio App. 3d 772, 595 N.E.2d 425 (1991); Taylor v. Black & Decker Mfg. Co., 21 Ohio App. 3d 186, 486 N.E.2d 1173 (1984).

[103] Walker v. Celanese Piping Sys., Nos. 86 CV-08-5233 (Ohio C.P. Franklin County Feb. 3, 1987), *aff'd*, Nos. AP 307, 308, 1987 WL 14236 (Ohio Ct. App. Franklin County July 16, 1987).

[104] *Id. See also* Bazdar v. Koppers Co., 524 F. Supp. 1194 (N.D. Ohio 1981), *appeal dismissed*, 705 F.2d 451 (6th Cir. 1982).

[105] Rule 15(C) OHIO R. CIV. P. allows claims or defenses set forth in amended pleadings to relate back to the date of the original proceeding. Rule 15(D) allows for the use of "Doe" defendants who, after identification, can be designated as defendants and have service made upon them. Provided that the specific requirements of the Rules are met, the amended pleading will not be subject to a statute of limitation defense even where a new defendant is designated due to mistake or misnomer at the time of filing. Columbus Bd. of Educ. v. Armstrong World Indu., Inc., 89 Ohio App. 3d 846, 627 N.E.2d 1033 (1993).

first decision holding that an amended complaint seeking only to designate additional plaintiffs was not within the purview of Rule 15(C) appears to be *Neff v. Celanese Piping Systems.*[106]

In addition, the savings statute allows for a one year extension of the applicable statute of limitations (here, the personal injury statute) where a complaint was timely filed and dismissed or otherwise resolved for reasons within its purview.[107] A similar extension is provided for in the wrongful death act.[108]

B. Forseeability: Product Misuse

Whether a defect poses a foreseeable risk of harm is a pervasive question in design defect litigation and appears in many other circumstances. The foreseeability requirement, which existed prior to adoption of the Act, is specifically set forth in the Act's design defect definition.[109] There are no

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[106]No. 85 CV-04-2279 (C.P. Mar. 31, 1987), *aff'd on other grounds*, No. 87 AP-383, 1987 WL 16792 (Ohio Ct. App. Franklin County, Sept. 8, 1987). The trial court held that Rule 15 could not be used as a substitute for proceeding under the joinder provisions of Rules 19 and 20. This approach was subsequently taken in Littleton v. Good Samaritan Hosp. & Health Ctr., 39 Ohio St. 3d 86, 529 N.E.2d 449 (1988) (after a limitation period has run, a complaint may not be amended to add a new plaintiff seeking to allege a new cause of action).

[107]OHIO REV. CODE § 2305.19. The statute provides, in part, that:

> In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date.

A common application of the savings statute occurs after a party has entered into a voluntary dismissal pursuant to Rule 41(A) OHIO R. CIV. P. The one year period runs from filing of the dismissal rather than the date the dismissal is journalized. Gardner v. Gleydura, 98 Ohio App. 3d 277, 648 N.E.2d 537 (1994). At least three appellate districts have held that a party may use the savings clause only once to invoke the additional one year period. Hancock v. Kroger Co., 103 Ohio App. 3d 266, 659 N.E.2d 336 (1995), and cases cited therein.

[108]OHIO REV. CODE § 2125.04. Mere filing of an action is insufficient to obtain the extension of this provision. Moreover, a savings statute is not to be used as a means to toll the statute of limitations. Motorists Mut. Ins. Co. v. Huron Rd. Hosp., 73 Ohio St. 3d 391, 396-7, 653 N.E.2d 235, 239-240 (1995).

[109]OHIO REV. CODE § 2307.75(A)(1) and (2) provide that a product is defective in design or formulation, if either:

> 1. . . . the foreseeable risks associated with its design . . . exceeded the benefits . . .;
> 2. It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably forseeable manner.

Forseeable risk is defined as a risk of harm associated with an intended or reasonably foreseeable use, modification, or alteration of the product which should have been recognized by the manufacturer pursuant to standards specified in the section. OHIO REV. CODE § 2307.71(F).

significant differences between pre-Act and post-Act opinions in their application of the misuse defense. Strictly speaking, the burden of proof as to foreseeability rests on plaintiff.[110] From a more practical vantage point the defendant assumes the burden of proof by seeking to establish that the defect/ injury nexus was not foreseeble as it resulted from unreasonable or unforseeable misuse or alteration of its product.[111]

The Ohio Supreme Court has indicated that in a strict liability action, as distinct from a negligence based action, the affirmative defense is that of unforeseeable misuse.[112] The absence of a foreseeable misuse absolved a defendant manufacturer of both negligence and strict tort liability in *Menifee*[113] where decedent's death was caused by inhalation of nitrogen and deprivation of oxygen. The injury occurred when an air compressor was used to clean equipment owned by decedent's employer and only the employer knew that the system would be used not only to power air tools which provided the cleaning agent, but also to supply air for breathing purposes. The court reasoned that the test of foreseeability was whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act and that this usually depends on the defendant's knowledge.[114] Defendants were responsible only for those risks that they perceived or should have perceived. Even though compressors are known to be used to supply air, on these facts none of the defendants (including the compressor manufacturer) could foresee that a system designed to generate power for air tools would be used to supply breathing air. "[A] manufacturer need not anticipate all uses to which its product may be put, nor guarantee that the product is incapable of causing injury in all of its possible uses."[115]

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[110]*See, e.g.,* Hunt v. Marksman Prods., 101 Ohio App. 3d 760, 656 N.E.2d 726 (1995), where defendant gained summary judgment as neither the design nor manufacture of a realistic appearing BB gun led to the actual shooting of plaintiff. The use of an actual gun, similar in appearance to the BB gun, was neither foreseeable nor a proximate cause of the harm.

[111]Alteration, which can negate the existence of a defect at time of manufacture, is discussed *supra* Part I(B)(2).

[112]Calmes v. Goodyear Tire & Rubber Co., 61 Ohio St. 3d 470, 575 N.E.2d 416 (1991). The terms unreasonable and unforseeable are not synonyms. *Id.* at 476, 575 N.E.2d at 421. Compare, however, the court's earlier recognition that a product cannot be defective in design under the Restatement unless it was used in an intended or reasonably forseeable manner. Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568, 576 (1981). Similarly, the term product "abuse" is frequently used in tandem with "misuse" or as a distinct term. Ohio law consistently applies the term "misuse" and, therefore, this article contains no analysis of the so-called "product abuse" defense.

[113]15 Ohio St. 3d 75, 472 N.E.2d 707 (1984).

[114]Despite this terminology, the reasoning is consistent with the Act's focus on the conduct of reasonable manufacturers.

[115]*Menifee,* 15 Ohio St. 3d at 78, 472 N.E.2d at 711 (1984).

Additional Decisions

Bowling v. Heil Co.[116] This decision reviews the evolution of Ohio product liability law and reiterates that there are two affirmative defenses to strict liability claims—voluntary and knowing assumption of the risk and unforeseeable product misuse.

Zavodney v. Weyerhauser Co.[117] The Act, despite the absence of a specific foreseeability requirement, contains the requirement by virtue of common law precedents and statutory interpretation so that unforseeable misuse remains an affirmative defense.

Shannon v. Waco Scaffolding & Equipment.[118] Where plaintiff attached a block pulley to a scaffold tower rather than a ceiling I-beam, it was proper to instruct the jury as to unforseeable misuse.

Phillips v. Wright Bernet, Inc.[119] Unforeseeable misuse of a machine by an industrial employer was sufficient to allow judgment as a matter of law.

Calvert Fire Insurance Co. v. Fyr-Fyter Sales & Service.[120] Improper use of insulation material is a use other than that intended for the product and, therefore, allows judgment for defendant as a matter of law.

Feliciano v. Euclid Chemical Co.[121] Affirming summary judgment where floor sealant manufacturer could not foresee that plaintiff's employer would store the containers improperly.

Smith v. TECO, Inc.[122] The use of a "jib" bucket to shield a lineman from power lines did not constitute an unforseeable misuse of the product.

C. Causation: Intervening and Superceding Cause

Proof of a causation link between an alleged defect and the injury for which a plaintiff seeks recovery is a mandatory element of plaintiff's burden of proof under decisional law and the Act.[123] Nevertheless, as with the affirmative

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[116]31 Ohio St. 3d 277, 511 N.E.2d 373 (1987). The primary holdings of this decision are that comparative principles are inapplicable to strict liability actions and that the principles of joint and several liability have not been abolished by the Contribution Among Joint Tortfeasors Act.

[117]No. 5:92CV1738 (N.D. Ohio June 8, 1994).

[118]Nos. 67406, 67604, 1995 Ohio App. LEXIS 3120 (Cuyahoga County July 27, 1995).

[119]No. CA93-01-010, 1993 Ohio App. LEXIS 2882 (Butler County June 7, 1993).

[120]67 Ohio App. 2d 11, 425 N.E.2d 910 (1979).

[121]No. 57208, 1990 Ohio App. LEXIS 2832 (Cuyahoga County July 12, 1990).

[122]No. 91AP-1318, 1992 Ohio App. LEXIS 3100 (Franklin County June 11, 1992).

[123]OHIO REV. CODE § 2307.73(2). *See also* State Farm Fire & Casualty Co. v. Chrysler Corp., 37 Ohio St.3d 1, 523 N.E.2d 489 (1988); Menifee v. Ohio Welding Prods., Inc., 15 Ohio St. 3d 75, 472 N.E.2d 707 (1984); Feldman v. Howard, 10 Ohio St. 2d 189, 226 N.E.2d 564 (1967). Lack of proximate cause was recently applied as one basis for denial of additional workers' compensation in regard to the absence of an anti-kickback device

defense of unforseeable misuse, the existence of a break in the chain of causation due to an intervening or superceding cause must be established by the defendant.[124]

To establish this defense the evidence must show that the intervening event was unforeseeable and comports with the general requirement that "causal connection is broken when a subsequent act, or failure to act, intervenes and completely removes the effect of the first act . . . and is itself the proximate cause of the injury."[125] Moreover, the intervening act must be both new and independent.[126]

The foundation for current application of intervening cause analysis was set forth in *Thrash v. U-Drive-It Co.*,[127] and *Cascone v. Herb Kay Co.*[128] The *Cascone* decision relied upon and followed the applicable aspects of the earlier decision in *Thrash*. Although neither case was a product liability action, both had fact patterns with product liability overtones. In *Cascone*, for example, an automobile mechanic sought to recover, on a negligence theory, for damages sustained when a hydraulic automobile lift suddenly lowered resulting in injuries to his head and arm. The court reversed a grant of summary judgment because there were fact issues as to whether repairs to the lift and its reactivation met the requisites for intervening cause. The court recognized that determinations as to intervening cause must be based on a two prong analysis:

1. whether, between the agency that created the original hazard and an injury resulting from such hazard, another conscious and responsible agency exists which should or could have eliminated the hazard, and
2. whether the act was foreseeable.

An affirmative answer to the first prong coupled with a negative answer to the second legally breaks the chain of causation and absolves the original actor from liability.

These issues are further complicated by the fact that causation issues often concern a plaintiff's own conduct. Although contributory negligence is not a

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on a saw. State *ex rel.* Lovell v. Industrial Comm'n, 74 Ohio St. 3d 250, 658 N.E.2d 284 (1996).

[124]The terms supervening and intervening are not synonymous though many courts use them interchangeably or collectively. An intervening cause arises from action or inaction which occurs betweeen the time of a negligent act or sale of a defective product and the time of the injury producing event. This occurrence will then be asserted as the proximate cause of harm. When the intervening event is so great as to terminate the linkage between the initial event or defect and the harm caused, it supercedes the earlier act and becomes the proximate cause of the harm thereby insulating the original actor from liability.

[125]OHIO JURY INSTRUCTION 11.30(3) (1995) (defining superceding cause).

[126]*Id.*

[127]158 Ohio St. 465, 110 N.E.2d 419 (1953).

[128]6 Ohio St. 3d 156, 451 N.E.2d 815 (1983).

defense to a product liability claim, the plaintiff's own conduct—which might otherwise be categorized as contributory negligence—can break the chain of causation. The nexus between the effect of conduct which could constitute both contributory negligence and intervening cause has been raised in a number of cases.[129]

Additional Decisions

Grover Hill Grain Co. v. Baughman-Oster, Inc.[130] The determination of whether an intervening act is sufficiently independent to break the chain of causation is a question of fact. Here, the negligent over-torquing of bolts during assembly of a grain bin, which led to the collapse of the bin, would be an intervening cause provided that the assembler was not an agent of the manufacturer.[131]

Leibreich v. A. J. Refrigeration, Inc.[132] The installer of a truck refrigeration unit was not entitled to summary judgment based on intervening cause due to a fact question as to whether the installer could foresee that drivers would leave the engine running. Absent a finding that the alleged intervening act was unforeseeable, the defense is not established. If foreseeble, the intervening act is a consequence of the original act and, therefore, within the causation chain.

R. H. Macy & Co. v. Otis Elevator Co.[133] Intervening cause is available as a defense in product liability actions. The defense can be invoked to avoid liability where the intervening cause is unforeseeable and the proximate cause of the injury. This is allowed despite the fact that the occurrence may have been due to defendant's own negligence. A jury instruction on intervening cause was appropriate and did not amount to a charge which would allow the jury to compare the negligence of the parties.

The decision affirms Ohio Jury Instruction 11.30(3) which requires that a superceding cause exists only where the intervening act is new and independent. "The term 'independent' means the absence of any connection or relationship . . . between the original and subsequent act . . . *The term 'new' means that the second act of negligence could not reasonably have been foreseen.*"[134]

[129]Clark v. Snapper Power Equip. Co., No. 93 CA 9, 1993 Ohio App. LEXIS 5548 (Miami County Nov. 18, 1993) (plaintiff's own actions can constitute intervening cause); *Cf.* Hardiman v. ZEP Mfg. Co., 14 Ohio App. 3d 222, 470 N.E.2d 941 (1984) (intervening cause generally contemplates actions of a third party and to permit a jury charge on intervening cause based on plaintiff's own conduct is an improper equivalent of contributory negligence).

[130]728 F.2d 784 (6th Cir. 1984).

[131]The opinion makes clear that the facts fully supported a finding of intervening cause, but reversed judgment for the manufacturer on the grounds that the district court did not set forth adequate fact findings in regard to the agency issue.

[132]67 Ohio St. 3d 266, 617 N.E.2d 1068 (1993).

[133]51 Ohio St. 3d 108, 554 N.E.2d 1313 (1990).

[134]*Id.* at 111, 554 N.E.2d at 1317.

Bruns v. Cooper Industries, Inc.[135] Plaintiff, while working as a construction mechanic, was injured when struck by a fragment of a steel hammer head which broke off during use. A warning incorporated onto the handle of the hammer had worn off. The employer's act of providing plaintiff with the warningless hammer was unforeseeable and a superceding cause sufficient to support the granting of summary judgment.

D. Failure to Warn Claims (Ohio Rev. Code § 2307.76(B)) and Related Defenses

Although failure to warn cases are easily pled and usually reach the jury, there are defenses to such claims. These defenses are varied, exist at both the common law and by statute, and are represented in a wide body of decisional law. In *Crislip v. TCH Liquidating Co.*[136] The court adopted the rule that if a warning is given, the seller can reasonably assume that it will be read and obeyed. If that warning or instruction is adequate, this assumption can result in judgment for the defense. This defense is difficult to establish as a matter of law.[137] The complete defense set forth in *Temple*,[138] which held that no negligence based failure to warn claim existed as a matter of law where the product complied with an applicable safety regulation (which covered the alleged defect), is no longer viable. First, the defense was limited to negligence actions and had no bearing on a strict liability failure to warn claim. Second, the defense is not carried forward in Ohio Revised Code section 2307.76.

Additional Decisions

Ditto v. Monsanto Co.[139] Chemical manufacturer had no duty to warn employees of industrial user of chemicals pursuant to the sophisticated purchaser doctrine of *Adams v. Union Carbide Corp.*[140]

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[135] 78 Ohio App. 3d 428, 605 N.E.2d 395 (1992). *See also* Clark v. Snapper, No. 93 CA 9, 1993 Ohio App. LEXIS 5548 (Miami County Nov. 18, 1993); Chaplynski v. Van Holle, No. CA91-08-060, 1992 Ohio App. LEXIS 1929 (Clermont County Apr. 13, 1992).

[136] 52 Ohio St. 3d 251, 556 N.E.2d 1177 (1990).

[137] *See, e.g.*, Hardiman v. ZEP Mfg. Co., 14 Ohio App. 3d 222, 470 N.E.2d 941 (1984) (plaintiff recovered despite admitting that he did not read the warning). *But see* Sproles v. Simpson Fence Co., 99 Ohio App. 3d 72, 649 N.E.2d 1297 (1994) (a warning and plaintiff's knowledge combined to support summary judgment due to assumption of the risk as a matter of law).

[138] 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

[139] 36 F.3d 1097 (6th Cir. 1994).

[140] 737 F.2d 1453 (6th Cir.), *cert denied*, 469 U.S. 1062 (1984). *But see* Steinke v. Koch Fuels, Inc., 78 Ohio App. 3d 791, 605 N.E.2d 1341 (1992) (a bulk supplier of hazardous material had a duty to warn the ultimate user of the product's danger regardless of the employer's knowledge).

Phan v. Presrite Corp.[141] Summary judgment for a manufacturer was proper where there was an adequate warning on the foot switch of a power press and the employer knew of available safety devices.

Carrel v. Allied Products Corp.[142] Plaintiff's knowledge of danger, based upon twenty years of experience, negated any need to warn.

Hanlon v. Lane.[143] Danger of carbon monoxide poisoning from an improperly vented gas furnace is an open and obvious danger.

Gawloski v. Miller Brewing Co.[144] Dangers of alcoholic beverages are a matter of common knowledge (rejecting a "nullification" claim based on advertising).

Consumers of Ohio v. Brown & Williamson Tobacco Corp.[145] Risks posed by smoking are within scope of knowledge of ordinary consumer.

E. Negligence, Comparative Negligence, and Assumption of the Risk: The Traditional Conduct Based Defenses

These related yet distinct concepts are treated together for convenience.[146]

Comparative negligence, as set forth in Ohio Revised Code section 2315.19, is inapplicable to a product liability claim brought pursuant to the Act.[147] Contributory negligence is not an affirmative defense to product liability

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[141] 100 Ohio App. 3d 195, 653 N.E.2d 708 (1994).

[142] No. 9-94-24, 1995 Ohio App. LEXIS 3091 (Marion County July 11, 1995).

[143] 98 Ohio App. 3d 148, 648 N.E.2d 26 (1994).

[144] 96 Ohio App. 3d 160, 644 N.E.2d 731 (1994). *See also* Desatnik v. Lem Motlow Prop. Inc., No. 84 CA 104, 1986 WL 760 (Ohio Ct. App. Mahoning County Jan. 9, 1986).

[145] 52 F.3d 325 (6th Cir. 1995). *See also* Paugh v. R.J. Reynolds Tobacco Co., 834 F. Supp. 228 (N.D. Ohio 1993). Similar conclusions have been reached in a variety of contexts. *See, e.g.*, Shaffer v. AMF, Inc., 842 F.2d 893 (6th Cir. 1988) (motorcycle riding); Briney v. Sears, Roebuck & Co., 782 F.2d 585 (6th Cir. 1986) (saw blade, assumption of risk); Koepke v. Crosman Arms Co., 65 Ohio App. 3d 1, 582 N.E.2d 1000 (1989) (BB gun); and Taylor v. Yale & Towne Mfg. Co., 36 Ohio App. 3d 62, 520 N.E.2d 1375 (1987) (truck engine sparking).

[146] For purposes of Ohio Rev. Code § 2315.19 (Comparative negligence), the defenses of assumption of the risk and contributory negligence have been merged. Anderson v. Ceccardi, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983). Except as to suppliers, this merger has no bearing on product liability actions. *See* OHIO REV. CODE § 2315.20.

[147] This creates a difficult situation where a plaintiff has brought suit against both a negligent individual or business entity defendant and a product liability defendant. Unlike most states, the Ohio courts have not adopted a common law form of comparative fault to supplement the statute. In such cases it is likely that the product liability defendant will be deemed liable for the entire injury without regard to the contribution to harm of the negligent co-defendant. Moreover, although the negligent defendant could be jointly and severally liable only for economic damages pursuant to OHIO REV. CODE § 2315.19(D), the product liability defendant may well be jointly and severally liable for the entire judgment. The theoretical protection afforded to the product liability defendant pursuant to the Contribution Among Joint Tortfeasors Act, OHIO REV. CODE §§ 2307.31 and 2307.32, could provide little practical benefit. No Ohio decision appears to address these questions.

claims.[148] Conduct which evidences mere negligence on the part of a plaintiff is irrelevant under both the case law and the Act.[149] Comparative negligence, however, is applicable to negligence based claims against product suppliers as provided in Ohio Revised Code section 2307.78.[150] Ohio does not recognize a common law comparative fault approach to supplement the statute.[151]

Assumption of the risk is available as an affirmative defense to a product liability action. *See* Ohio Revised Code section 2315.20(B). Express or implied assumption, where the risk assumed was the proximate cause of harm, is a complete bar to any claim.

Additional Decisions

1. Comparative Negligence

a. Common Law Negligence Based Actions

Both state and federal courts applied comparative negligence to common law product liability design defect claims which sounded in negligence.[152] As such a claim cannot be brought pursuant to the Act, these decisions are applicable only to actions filed prior to January 5, 1988.

b. Strict Liability and Product Liability Act Claims

Crislip v. Twentieth Century Heating & Ventilating Co.[153] Comparative negligence is not available as a defense to a strict liability failure to warn claim.

Bowling v. Heil Co.[154] As comparative negligence is predicated on "fault" concepts, it has no application to claims sounding in strict liability.

c. Jury Verdict - Procedural Aspects

O'Connell v. Chesapeake & Ohio R.R. Co.[155] In a case tried under comparative negligence principles, three-fourths of the jury must agree as to both negligence

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[148]OHIO REV. CODE § 2315.20(C)(1).

[149]This approach is consistent with RESTATEMENT (SECOND) OF TORTS (SECOND) 402A cmt. n (1965).

[150]OHIO REV. CODE § 2315(C)(2).

[151]This despite the court's obvious power to do so as illustrated by the fact that, in order to give the statute retroactive effect, the court created common law comparative negligence in a form identical to that of the statute. Wilfong v. Batdorf, 6 Ohio St. 3d 100, 451 N.E.2d 1185 (1983).

[152]*See* Briney v. Sears, Roebuck & Co., 782 F.2d 585 (6th Cir. 1986); Onderko v. Richmond Mfg. Co., 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987).

[153]52 Ohio St.3d 251, 556 N.E.2d 1177 (1990).

[154]31 Ohio St.3d 277, 511 N.E.2d 373 (1987). *Accord* Onderko. *See also* Eberly v. A.P. Controls, Inc., 61 Ohio St. 3d 27, 572 N.E.2d 633 (1991).

[155]58 Ohio St. 3d 226, 569 N.E.2d 889 (1991).

and causation. Only those jurors who so find may participate in the apportionment of comparative negligence.

2. Assumption of the Risk

Except as specified below, assumption of the risk is a complete defense precluding all recovery.

a. Generally

Carrel v. Allied Products Corp.[156] Assumption of the risk was recognized as a complete defense as a matter of law where plaintiff placed his hand in a die space without utilizing an available safety device. That an unexpected act of a co-worker activated the press was irrelevant.

Benjamin v. Deffet Rentals, Inc.[157] Plaintiff assumed the risk of slipping on a wet diving board.[158]

b. In the Workplace

Courts have drawn distinctions between cases sounding in product liability outside the workplace and claims arising from workplace related injuries. It is more difficult to assert the defense for workplace injuries as the plaintiff is in a position to argue that his or her assumption was mandated by the job and that it was, therefore, not a voluntary assumption. This approach is consistent with cases throughout the United States as exemplified by the well known decision in *Cepeda v. Cumberland Engineering Co.*[159]

Freas v. Prater Construction Corp., Inc.[160] Violation of proper warnings as to crane disassembly was assumption of the risk. *Onderko* recognizes assumption of risk, express or implied, as a full defense, but arguably requires that the assumption be unreasonable.

Cremeans v. Willmar Henderson Manufacturing Co.[161] This case illustrates the distinction between workplace related assumption and assumption in other

[156]No. 9-94-24, 1995 Ohio App. LEXIS 3091 (Marion County July 11, 1995).

[157]66 Ohio St. 2d 86, 419 N.E.2d 883 (1981).

[158]There are a plethora of assumption cases in both the state and federal courts. *See, e.g.*, Parr v. Clark Equip. Co., 844 F.2d 789 (6th Cir. 1988); Briney v. Sears, Roebuck & Co., 782 F.2d 585 (6th Cir. 1986); Sedgwick v. Kawasaki Cycleworks, Inc., 71 Ohio App. 3d 117, 593 N.E.2d 69 (1991); Meador v. Wagner-Smith, No. 11886, 1990 Ohio App. LEXIS 2179 (Montgomery County June 1, 1990).

[159]386 A.2d 816 (N.J. 1978).

[160]60 Ohio St. 3d 6, 573 N.E.2d 27 (1991).

[161]57 Ohio St. 3d 145, 566 N.E.2d 1203 (1991). This holding is consistent with *Freas* in that plaintiff in *Freas* could have acted safely consistent with his job duties. *See also* Evanoff v. Grove Mfg. Co., 99 Ohio App. 3d 339, 650 N.E.2d 914 (1994) (summary judgment improper due to a material fact issue as to whether the injured employee had other options in positioning a crane).

contexts noting that an employee does not assume the risk of injury which occurs in the course of employment where that risk must be encountered as part of job duties.

Whiston v. Bio-Lab, Inc.[162] A jury instruction on assumption, consistent with Ohio Revised Code section 2315.20, for injuries sustained at the workplace was permitted. The court distinguished *Cremeans* on the grounds that it preceded statute enactment.[163]

Kukay v. Crown Controls Corp.,[164]and *Sigman v. General Electric Co.*[165] These decisions hold that there is no assumption due to lack of voluntary action where the injured party encountered risk due to job duties.

c. Suppliers (Ohio Rev. Code section 2307.78)

As product liability claims against suppliers rest in negligence, the comparative negligence statute applies. Consistent with the statute[166] and case law,[167] assumption is not a complete defense but will be weighed as a cause of harm factor. If plaintiff's contribution to harm exceeds the combined negligence of all others against whom recovery is sought, the defense will become a complete bar.[168]

d. Parent/child

Parents cannot assume the risk on behalf of infant children. As a norm, one cannot encounter or accept a risk on behalf of another. This principle is all the more important where a child is injured due to the action of a parent. Both a crib manufacturer and a car seat manufacturer were unable to assert assump-

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[162] 85 Ohio App. 3d 300, 619 N.E.2d 1047 (1993).

[163] *See also* Syler v. Signode Corp., 76 Ohio App. 3d 250, 601 N.E.2d 225 (1992) (seeking to reconcile various opinions and approaches); Knueven v. Deere & Co., No. 12-94-7, 1995 Ohio App. LEXIS 1597 (Putnam County Apr. 13, 1995) (*Cremeans* approach is inapplicable to a self-employed farmer).

[164] No. S-90-7, 1991 Ohio App. LEXIS 5178 (Sandusky County Oct. 25, 1991).

[165] 77 Ohio App. 3d 430, 602 N.E.2d 711 (1991).

[166] OHIO REV. CODE § 2307.78 addresses the liability of a supplier as defined in OHIO REV. CODE § 2307.71(O). Suppliers can be liable for harm caused by their own negligence or failure to conform to their own representations. Ohio Rev. Code § 2307.78(A); Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co., 42 Ohio St. 3d 40, 537 N.E.2d 624 (1989). If the conditions of Ohio Rev. Code § 2307.78(B) exist a supplier will be treated as though it were the manufacturer of the product.

[167] Anderson v. Ceccardi, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983). Similarly, assumption of the risk can become a complete bar. *See* Sproles v. Simpson Fence Co., 99 Ohio App. 3d 72, 649 N.E.2d 1297 (1994) (assumption outweighed any negligence of an electric fence installer to a degree permitting summary judgment).

[168] *See* OHIO REV. CODE §§ 2315.19 and 2315.20(B).

tion of the risk for harm to a child despite parental knowledge of the danger posed by the products.[169]

F. State of the Art/Safety History

> Indeed, in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices.[170]

This doctrine has two key practical aspects: If the product is state of the art, and meets other requirements, it is not defective. If the product is not state of the art, a defect finding is close to inevitable. Compliance with state of the art norms is a complete defense. Ohio Revised Code section 2307.75(F) declares that a product is not defective in design or formulation where the following conditions are met:

1. At the time the product left the control of the manufacturer, a practical and technically feasible alternative design, which would have prevented the harm complained of, was not available; without
2. substantially impairing the usefulness or intended purpose of the product; unless
3. the manufacturer acted unreasonably in introducing the product into trade or commerce.[171]

This statutory approach eliminates the hindsight test. The controlling reference point, the time that the product left its manufacturer's control, precludes any claim that a product should be judged by standards applicable at or after the time of injury. The statute also appears to resolve the conflict between the two primary definitions of "state of the art." It reflects the view that a product conforms to state of the art if it includes all safety features available at the time of distribution which have proven themselves in the market place as cost effective. The statute implicitly rejects the view that requires a product to include all safety features that were available by the imaginative use of cutting edge technology.

Compliance with government or industry standards, which relates to state of the art, deserves brief mention. As a norm, evidence of compliance with applicable government or industry standards will be some evidence of non-defect, while non-compliance will be strong evidence of defect with a highly persuasive jury effect.[172]

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[169] Avila v. Questor Juvenile Furniture Co., 74 Ohio App. 3d 597, 599 N.E.2d 771 (1991) (car seat); Mulloy v. Longaberger, 47 Ohio App.3d 77, 547 N.E.2d 411 (1989) (cradle).

[170] The T. J. Hooper, 60 F.2d 737 (2d Cir.), *cert denied*, 287 U.S. 662 (1932) (L. Hand, J. describing custom, but equally applicable to state of the art).

[171] No Ohio decisions appear to address this principle. Fireworks, some toys, and other products with low utility and high risk are potentially subject to this rule.

[172] *See* Minichello v. U.S. Indus. Inc., 756 F.2d 26 (6th Cir. 1985) and Behanan v. Desco Distrib. Co., 98 Ohio App. 3d 23, 647 N.E.2d 830 (1994) (OHSA standards not admissible

Although distinct from state of the art evidence, evidence that a product has not previously caused harm, or has an exemplary safety history, bears on similar concerns. Introduction of such evidence is the converse of a plaintiff's effort to introduce facts of prior injuries caused by the defect which allegedly caused harm in the subject case.[173] There appears to be no clear Ohio law as to the extent to which prior safety history evidence can be used to refute claims of design defect.

Additional Decisions

1. State of the Art

Jacobs v. E.I. Dupont De Nemours & Co.[174] The manufacturer of flourinated ethylene propylene film and polytetrafluorethylene, used by another company to manufacture an allegedly defective jaw implant, was exempt from liability pursuant to Ohio Revised Code section 2307.75(F). The exemption applied as there was no evidence of an alternative design that would have avoided the injuries sustained by plaintiff.

Layne v. GAF Corp.[175] On motion for judgment notwithstanding verdict after a verdict in favor of plaintiff who claimed asbestos related mesothelioma, the court reviewed several aspects of Ohio product liability law. It found that by

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on various questions of liability due to specific language of statute); Sours v. General Motors Corp., 717 F.2d 1511 (6th Cir. 1983) (compliance with FMVSS is a non-conclusive guide); Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 432 N.E.2d 814, *cert. denied*, 459 U.S. 857 (1982) (statutory regulation as guide to reasonableness of design); Minichello & Smith v. Raymond Corp., No. 57670, 1990 Ohio App. LEXIS 4622 (Cuyahoga County Oct. 25, 1990) (evidence of ANSI standards admissible); Whiston v. Bio-Lab, Inc., 85 Ohio App. 3d 300, 619 N.E.2d 1047 (1993) (violation of FIFRA label standards not conclusive).

[173] *See, e.g.*, Renfro v. Black, 52 Ohio St. 3d 27, 556 N.E.2d 150 (1990), and cases cited therein. Evidence of similar claims or accidents is not relevant to a strict liability claim. Mulloy v. Longaberger, Inc., 47 Ohio App. 3d 77, 547 N.E.2d 411 (1989) (prior injuries due to inhalation of aromatic hydrocarbons in a paint stain) relying on Onderko v. Richmond Mfg. Co., 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987). The discussion in Onderko may be more limited than the total prohibition indicated in Mulloy dependent upon the degree to which the second sentence quoted below qualifies the first:

> Evidence of prior similar accidents, offered to show that a defendant knew or should have known of a product's dangerous propensities, is relevant only to negligence. Such evidence has no bearing in a claim based on strict liability where its purpose, . . . is to show knowledge or notice of prior accidents.

Onderko at 301, 511 N.E.2d at 392. *Cf.* Felden v. Ashland Chem. Co., 91 Ohio App. 3d 48, 631 N.E.2d 689 (1993) (application of Rule of Evidence 407 in an employee's intentional tort action; permitting evidence of prior occurrences as relevant to question of employer knowledge).

[174] 67 F.3d 1219 (6th Cir. 1995).

[175] 42 Ohio Misc. 2d 19, 537 N.E.2d 252 (C.P. 1988). *Cf.* Eldridge v. Firestone Tire & Rubber Co., 24 Ohio App. 3d 94, 493 N.E.2d 293 (1985) (absence of a trailing guard on a lawn mower raised a question of excessive preventable harm rather than state of the art).

commingling Comments j and k of the Restatement (Second) of Torts section 402(A), a manufacturer is entitled to assert a state of the art defense. The jury charge defined the concept as:

> . . . a manufacturer need not instruct or warn of its product [defect] unless and until the state of medical, scientific and technical research and knowledge has reached a level of development that would make a reasonably prudent manufacturer aware of the unreasonable risks of harm in the exposure to the persons who would foreseeably be exposed to that product, and aware of the necessity to instruct or warn those individuals against such risks of harm.[176]

Sabel v. Newbury Industries Inc.[177] Evidence of state of the art is properly admissible to contest the feasibility of an alternative design. Refusal to instruct the jury that state of the art is not a defense was not error.

2. Safety Record

The limited available law indicates that safety record evidence is admissible to impeach testimony asserting the presence of a defect and to establish that a manufacturer lacked prior notice of the defect. The law is ambiguous as to whether such data can be used as evidence of non-defect.

Drake v. Caterpillar Tractor Co.[178] The court neither approves nor disapproves of a rule regarding the proper scope of testimony concerning a product's safety record. Defense evidence of a tractor's safety record was admitted for impeachment purposes, but not for proof of defect. Counsel's closing argument improperly cast the evidence as proof of non-defect. A concurring opinion argued that prior safety history (including prior accidents or their absence) should be admissible if there is sufficient similarity.

Minichello v. U.S. Indus., Inc.[179] The court recognized that there is good authority both permitting and rejecting evidence of the non-occurrence of past accidents. Without specifically approving a rule admitting such evidence, the court found that the trial court did not abuse its discretion in permitting evidence of the non-occurrence of past accidents. The court relied on *Koloda v. Gen. Motors Parts Div.*[180] which noted that the modern trend is to admit safety performance evidence and ruled that such evidence was admissible to show lack of notice of a defect.

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[176] *Layne*, 42 Ohio Misc. 2d at 25, 537 N.E.2d at 258. *See also* Steinfurth v. Armstrong World Indus., 27 Ohio Misc. 2d 21, 500 N.E.2d 409 (C.P. 1986) (defining state of the art).

[177] No. 10-197, 1985 WL 4935 (Ohio Ct. App. Lake County Dec. 31, 1985).

[178] 15 Ohio St. 3d 346, 474 N.E.2d 291 (1984).

[179] 756 F.2d 26 (6th Cir. 1985).

[180] 716 F.2d 373 (6th Cir. 1983).

G. The Seat Belt Defense

In a crashworthiness case a manufacturer is permitted to assert that some or all of the injuries sustained would have been averted had the injured party worn an available seat belt. This defense can be utilized to mitigate damages or, in appropriate cases, as a full defense.[181] In such cases the burden of proof appears to be upon the defense.[182]

> The Tenth District Court of Appeals recently cited approvingly a law review article which posited that before the seat belt defense could be submitted to the jury, factual evidence would be required to support that either the injuries sustained would have been lessened or that the accident would not have occurred had the plaintiff been wearing a seat belt.[183]

This defense is currently limited to crashworthiness actions and will not be judicially extended to other civil actions.[184]

H. The Government Contractor Defense

Although based on federal law, this defense to design defect litigation (as distinct from manufacturing flaws) can come to bear on actions brought under state law. This is made clear in the leading case of *Boyle v. United Technologies, Corp.*[185] which involved an action brought under Virginia law for the death of a United States Marine allegedly due to defects in a helicopter's escape-hatch system. Despite the absence of federal preemptive legislation, the unique federal interest in civil liability arising out of federal procurement contracts, even in actions between private litigants, was sufficient to mandate application of federal law to the exclusion of state law.

Modifying prior law as set forth in *Feres v. United States*,[186] the Court redefined the Government Contractor Defense to preclude state law liability for design defects in military equipment, when:

1. The United States approved reasonably precise specifications;
2. The equipment conformed to those specifications; and, when applicable,

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[181] OHIO REV. CODE § 4513.263(F)(2).

[182] *See* Bantel v. Herbert, 31 Ohio App. 3d 167, 509 N.E.2d 981 (1987).

[183] *Id.* at 168-69, 509 N.E.2d at 982-3, citing *Woods v. Columbus*, 23 Ohio App. 3d 163, 167, 492 N.E.2d 466, 470, relying on Stephen J. Werber, *A Multi-Disciplinary Approach to Seat Belt Issues*, 29 CLEV. ST. L. REV. 217, 246 (1980). The cited article also discusses the dynamics and kinematics of automobile collisions in relation to crashworthiness actions discussed *supra* Part I(F).

[184] *See* Vogel v. Wells, 57 Ohio St. 3d 91, 566 N.E.2d 154 (1991).

[185] 487 U.S. 500 (1988).

[186] 340 U.S. 135 (1950).

3. The supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States.[187]

III. DAMAGES *(Ohio Rev. Code section 2307.72 and related sections)*

Compensatory damages available to claimants in a product liability action pursuant to the Act are largely consistent with traditional and well recognized measures of compensation.[188] There are no significant differences between product liability plaintiffs and other tort plaintiffs in regard to such areas as pain and suffering, past and future medical expenses, past and future loss of earnings, or loss of society and consortium.[189]

Claims for hedonistic damages, loss of the ability to enjoy or perform usual functions and activities or to participate in the amenities of life (loss of life's enjoyment), are a relatively recent development in tort law. They are compensable under Ohio law. In *Fantozzi v. Sandusky Cement Prod. Co.*,[190] a negligence action, the plaintiff sought such damages, together with pain and suffering, for injuries received when a warped section of a metal concrete chute fell on him. The jury awarded specific sums for both the pain and suffering and the loss of life's enjoyment. In the erroneous belief that an earlier decision[191] limited loss of life's enjoyment damages to claims predicated on emotional

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[187]*Boyle*, 487 U.S. at 499. This definition of the defense was applied, and summary judgment granted, as to claims of both military and civilian personnel in In re AirCraft Crash Litig. Frederick, Md., 752 F.Supp. 1326 (S.D. Ohio 1990), *aff'd sub nom*, Darling v. Boeing Co., 935 F.2d 269 (6th Cir. 1991).

[188]*See* OHIO REV. CODE § 2307.72 which describes the types of damages available in product liability claims. OHIO REV. CODE § 2307.72(D)(1) states that the Act does not supercede, modify, or otherwise affect laws addressing harm which arises from "contamination or pollution of the environment, including . . . a threat of contamination or pollution from hazardous or toxic substances." "Environment" is defined in OHIO REV. CODE § 2307.71(C); "Hazardous or toxic substances" is defined in OHIO REV. CODE § 2307.71(H).

OHIO REV. CODE § 2307.73 provides for the award of compensatory damages where a defective product proximately causes harm. "Harm" is defined in OHIO REV. CODE § 2307.71(G) to include death, physical injury to the person, serious emotional distress, or physical damage to property other than the product itself. This definition expressly excludes economic loss.

[189]No further discussion of these traditional sources of compensatory damages will be provided. The statutory modification of the collateral benefits rule contained in Ohio Rev. Code § 2317.45, which applied to all torts including product liability claims, was held unconstitutional in Sorrell v. Thevenir, 69 Ohio St. 3d 415, 633 N.E.2d 504 (1994). Ohio adheres to the traditional common law collateral benefits rule. *But see* Buchman v. Board of Educ., 73 Ohio St. 3d 260, 652 N.E.2d 952 (1995) (political subdivisions statutory exception upheld).

[190]64 Ohio St.3d 601, 597 N.E.2d 474 (1992).

[191]Binns v. Fredendall, 32 Ohio St. 3d 244, 513 N.E.2d 278 (1987).

distress arising contemporaneously with physical injury, the court of appeals reversed the award of enjoyment damages.

The Ohio Supreme Court held that this form of damages is available, observing that Ohio Jury Instruction number 23.01 provides that in determining the amount of damages to be awarded, the jury is to consider "the ability or inability to perform usual activities." Though it was error to charge the jury that it could award damages for "loss of enjoyment of life" as distinct from "inability to perform usual activities," this was not prejudicial error. The applicable law, and its limits, are set forth in Syllabus 2 of the decision:

> Where an individual suffers personal injuries, the question of damages for "loss of ability to perform the plaintiff's usual functions" may, when evidence thereon has been adduced, be submitted to the jury, and set forth in a special interrogatory and separate finding of damages, provided, however, that the court instructs the jury that if it awards such damages, it shall not award additional damages for that same loss when considering any other element of damages, such as physical and mental pain and suffering.[192]

The opinion is written with sufficient breadth as to make clear that this element of damages will be available to those entitled to compensation in product liability claims.

Laws relating to the areas of economic loss, compensation for emotional distress, and punitive damages are contained in the Act and are, therefore, discussed below.

A. *Economic Loss (Ohio Rev. Code section 2307.79)*

If a plaintiff is entitled to recover compensatory damages, that plaintiff may also recover for economic loss proximately caused by the product defect.[193] This loss can include damage to the product itself.[194] The Act's definitions for recovery of "harm" and for recovery of loss of bargain or "economic loss" are distinct. Absent a compensatory award for harm, there can be no recovery for economic loss.[195]

Although the Act does not distinguish between direct and indirect economic loss, the distinction is recognized in negligence actions between commercial entities as comprehensively discussed in *Queen City Terminals, Inc. v. General*

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[192] Fantozzi, 64 Ohio St. 3d at 601-02, 597 N.E.2d at 476.

[193] OHIO REV. CODE § 2307.79(A).

[194] OHIO REV. CODE § 2307.71(B).

[195] The parallel, of course, is to the traditional rule applicable to the award of punitive damages, carried forward in the Act, that such damages are available only when compensatory damages have been awarded. There need be no correlation between the amount of compensatory damages and the amount of economic loss damages. An award of low compensatory damages and high economic loss damages is valid.

American Transportation Corp.[196] Direct economic losses are those attributable to the decreased value of the product (the difference between the actual value of the defective product and its value if not defective). Indirect economic losses are consequential damages such as the lost value of production time and loss of profit.[197] Indirect economic damages can be recovered in a negligence action where the damages are caused by tangible, physical injury to persons or from property damage where there is direct causal nexus between the tangible damage and the indirect economic losses. This relationship need not exist for recovery of direct economic damages which, by definition, arise from property damage. The extent to which such distinctions will apply in product liability claims remains unclear. It is, however, likely that analogs will be drawn.[198]

Additional Decisions

LaPuma v. Collinwood Concrete.[199] Due to the absence of other independent damage, allegations of economic loss for property and repair damages resulting from the need to replace driveway concrete failed to state a claim for harm under Ohio Revised Code sections 2307.71(B) and 2307.79.[200]

Buck v. Sportcoach Div. of Coachman Indus., Inc.[201] Defendant was entitled to judgment as a matter of law as to plaintiff's claims for costs incurred for repairs, decrease in value, towing, lodging, and similar expenses allegedly caused by

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[196]73 Ohio St. 3d 609, 653 N.E.2d 661 (1995).

[197]Comparison to similar damages for breach of warranty claims and consequential and incidental damages pursuant to the Uniform Commercial Code provide a useful analogy. *See* OHIO REV. CODE §§ 1302.88 and 1302.89; Brant v. Wilkinson Printing Co., No. 15-93-1, 1993 Ohio App. LEXIS 3613 (Van Wert County July 14, 1993); Shiffer Indus. Inc. v. Lakewood Tool & Supply Co., No. 62744, 1993 Ohio App. LEXIS 2927 (Cuyahoga County June 10, 1993) (breach of warranty as an alternative remedy to a strict liability claim and recognizing that strict liability is available when commercial parties are not in privity per Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co., 42 Ohio St. 3d 40, 537 N.E.2d 624 (1989)).

[198]The body of law addressing economic loss claims predicated on negligence also provides guidance as to how these provisions of the Act will be applied. *See, e.g., Chemtrol*, 42 Ohio St. 3d 40, 537 N.E.2d 624 (economic loss, alone, is not a cognizable claim; economic loss includes decreased value of the product itself, consequential losses, and damage to the product); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965) (privity requirement in a product based negligence action); Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 54 Ohio St. 3d 1, 560 N.E.2d 206 (1990) (privity requirement); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975) (allowing recovery of "property damage" in a tort action for breach of implied warranty without privity). Note, however, that contrary to the mandate of several pre-Act cases that parties to economic loss claims stand in privity of contract, there is no privity requirement for claims brought pursuant to the Act.

[199]75 Ohio St.3d 64, 661 N.E.2d 714 (1996).

[200]Plaintiff's claim was not, however, preempted by the statute. The case was remanded for further proceedings based on a common law claim of implied warranty.

[201]No. 14858, 1991 Ohio App. LEXIS 2859 (Summit County June 25, 1991).

defects in a recreational vehicle as these were economic losses under Ohio Revised Code section 2307.71(B).

B. Emotional Distress

Claims for emotional distress have been the subject of considerable Ohio Supreme Court jurisprudence. A product liability claim is defined as a civil action seeking recovery from a manufacturer or supplier for specific compensatory damages which include "emotional distress."[202] The term, qualified by the word "serious," is also found within the Act's definition of "harm."[203] As the Act provides no further elucidation on the meaning and application of law to facts for emotional distress claims, existing decisional law will be decisive regardless of whether it is predicated on tort claims or product liability claims. These decisions, coupled with standard rules of statutory interpretation, make manifest that compensatory damages of this type are available in product liability actions only where there is "serious" emotional distress.

Recognition of modern concepts of emotional distress claims began with three 1983 decisions.[204] Together, these decisions stand for the rules that (1) one who through extreme and outrageous conduct intentionally or recklessly causes serious emotional distress is subject to liability;[205] and (2) a claim for negligent infliction of serious emotional distress may be stated without manifestation of physical injury *i.e.*, without contemporaneous physical injury.[206] The claim may be made by a bystander provided that injury to the third party is both serious and reasonably foreseeable.[207] To come within the purview of "serious" emotional distress, the injury must be severe and debilitating—such that a reasonable person, normally constituted, would be unable to adequately cope with the mental distress created by the circumstances.[208] This requirement is limited to cases in which there is no contemporaneous physical injury. Where physical injury is present, a lessened

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[202]OHIO REV. CODE § 2307.71(M).

[203]OHIO REV. CODE § 2307.71(G).

[204]Yeager v. Local Union 20, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983); Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983); Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

[205]*Yeager*, 6 Ohio St. 3d at 374, 453 N.E.2d at 671.

[206]*Paugh*, 6 Ohio St. 3d at 77, 451 N.E.2d at 765; Schultz, 4 Ohio St. 3d at 135-136, 447 N.E.2d at 113, Syllabus. *See also* Fantozzi v. Sandusky Cement Prods. Co., 64 Ohio St. 3d 601, 615, 597 N.E.2d 474, 485 (1992).

[207]*Paugh*, 6 Ohio St. 3d, 451 N.E.2d at 765. *See also* Smith v. Kings Entertainment Co., 99 Ohio App. 3d 1, 649 N.E.2d 1252 (1994) (relationship between plaintiff bystander and her friend, who was electrocuted, insufficient to allow a claim for negligent infliction of emotional distress).

[208]*Paugh*, 6 Ohio St. 3d at 78, 451 N.E.2d at 765.

degree of distress is actionable.[209] These decisions are consistent with the theories of non-fault based product liability claims. They are also consistent with the Act's demand that compensable harm be limited to "serious emotional distress."

Additional Decisions

Heiner v. Moretuzzo.[210] In this negligence and medical malpractice action, plaintiff was denied recovery for negligent infliction of serious emotional distress caused by fear of a nonexistent physical peril. The claim was predicated on plaintiff's reaction to being erroneously advised that her blood test for the Human Immunodeficiency Virus (HIV), which causes Acquired Immune Deficiency Syndrome (AIDS), was positive. The court accepted the legitimacy of plaintiff's suffering as real and debilitating. Nevertheless, "the facts of this case remind us that not every wrong is deserving of a legal remedy."[211]

Seimon v. Becton Dickinson & Co.[212] A nurse, pricked by an allegedly contaminated needle, sought recovery for emotional distress based on her fear that she would contract HIV. The court held that she failed to state a viable claim as there was no evidence of actual exposure to the HIV virus. The focus of the opinion is on the causation element in that there was no evidence that the needle was the proximate cause of her emotional distress.

Lavelle v. Owens-Corning Fiberglas Corp.[213] A plaintiff suffering from asbestosis may recover for increased fear of cancer if aware of the statistical data supporting such a potential and if suffering from resultant mental distress. Due to the absence of disease manifestation, no recovery for an increased risk of cancer was permitted.

C. Punitive Damages (Ohio Rev. Code section 2307.80)

Punitive or exemplary damages can be imposed upon manufacturers or suppliers in personal injury product liability claim actions provided that there is a judgment for compensatory damages.[214] Such damages may not be awarded in wrongful death actions, including those based upon product

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[209]Binns v. Fredendall, 32 Ohio St. 3d 244, 245-246, 513 N.E.2d 278, 280 (1987).

[210]73 Ohio St. 3d 80, 652 N.E.2d 664 (1995) (construing and distinguishing Schultz and Paugh).

[211]*Id.* at 88, 652 N.E.2d at 670.

[212]91 Ohio App. 3d 323, 632 N.E.2d 603 (1993).

[213]30 Ohio Misc. 2d 11, 507 N.E.2d 476 (C.P. 1987).

[214]Note, however, that when a course of events is governed by a single animus, regardless of the number of tort theories upon which liability is predicated, there can be only a single punitive damages award. Digital & Analog Design Corp. v. North Supply Co., 44 Ohio St. 3d 36, 540 N.E.2d 1358 (1989).

liability claims.[215] The ongoing debate as to the propriety of punitive damages, particularly in product liability actions, has led to various reform legislation which limits such damages. The imposition of virtually unlimited punitive damages awards has also engendered constitutional concerns.[216]

Ohio Revised Code section 2307.80 has drastically changed the common law rules regarding imposition of punitive damages by redefining the conduct required for their imposition, demanding proof of such conduct by clear and convincing evidence,[217] and having the court determine the amount of such damages based on a non-exclusive list of seven factors.[218] The court engages in this process only after a jury finding of punitive damages liability.[219] The fact that a product is defective does not establish the "flagrant disregard"[220] now required in lieu of less stringent common law requirements. The Act also prohibits the imposition of punitive damages upon drug manufacturers who, in the absence of fraud or violation of regulation, manufacture and sell their products in accord with the requirements of the Food and Drug Administration.[221]

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[215] Rubeck v. Huffman, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978). Subsequent amendments to Ohio Rev. Code § 2305.21 have retained the prohibition against punitive damages in wrongful death actions.

[216] *See* BMW of N. Am. v. Gore, 116 S. Ct. 1589 (1996), is the first Supreme Court decision to hold that an award of punitive damages was grossly excessive in violation of the due process mandate of the Fourteenth Amendment. The decision rejected the imposition, after remittitur, of two million dollars in punitive damages (under Alabama law) based on the improper painting of 1,000 vehicles when a maximum of 14 (fourteen) were sold in the state. Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) (denial of adequate review procedures as to the amount of punitive damages awards violates procedural due process); TXO Prods. Corp. v. Alliance Resources Group, 509 U.S. 443 (1993) (grossly excessive awards can violate due process, but an award over 500 times the amount of compensatory damages was upheld); Pacific Mut. Life Ins. v. Haslip, 499 U.S. 1 (1991) (reasonableness, rather than a mathematical bright line, guides the determination of whether an award is so great as to violate due process); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (punitive damages awards do not implicate the Excessive Fines Clause of the Eighth Amendment).

[217] OHIO REV. CODE § 2307.80(A) provides that to recover punitive damages the claimant must establish "by clear and convincing evidence, that harm for which he is entitled to recover compensatory damages . . . was the result of misconduct . . . that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question."

[218] OHIO REV. CODE § 2307.80(B) requires consideration of (1) the likelihood of serious harm; (2) awareness of that likelihood; (3) profitability of the misconduct; (4) the duration or concealment of the misconduct; (5) conduct following discovery of the misconduct; (6) defendant's financial condition; and (7) prior or likely future awards imposed on the defendant.

[219] OHIO REV. CODE § 2307.80(B).

[220] OHIO REV. CODE § 2307.80(A).

[221] OHIO REV. CODE § 2307.80(C).

The constitutional validity of the provision calling for the court, rather than the jury, to ascertain the amount of damages is highly suspect. A similar tort provision, contained in Ohio Revised Code section 2315.21(C)(2), has been deemed a violation of the right to trial by jury guaranteed by Section 5, Article I of the Ohio Constitution.[222]

Additional Decisions

Calmes v. Goodyear Tire & Rubber Co.[223] Plaintiff, injured due to alleged defects in a three-piece wheel rim and tire, brought suit on theories of negligence and strict liability. The court, affirming the appellate court's reversal of an award of punitive damages, reiterated the need for "actual malice" in the form of a state of mind characterized by either "(1) . . . hatred, ill will, or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."[224] Misconduct greater than mere negligence is required and foreseeability cannot be equated with "great probability." The punitive damages award was improper as the "great probability" requirement, which is equated with high foreseeability, was not met.

Leichtamer v. American Motors Corp.[225] The presence of fraud, malice, or insult is required to sustain a punitive damages award. A punitive damages award was upheld as actual malice could be inferred from defendant's conduct and the surrounding circumstances. Malice may be shown by intentional, reckless, wanton, willful, and gross acts. The requisite malice was established by evidence of advertising which went beyond the merely suggestive in regard to the vehicle's characteristics and inadequate testing procedures which reflected a flagrant indifference to the risk posed by a roll-bar which provided insufficient protection in a pitch-over accident.

Shannon v. Waco Scaffolding & Equip.[226] In rejecting a claim for damages under Ohio Revised Code section 2307.80(A), the court held that punitive damages are available only where there is conduct that creates a great probability of

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[222]Zoppo v. Homestead Ins. Co., 71 Ohio St. 3d 552, 644 N.E.2d 397 (1994). The only question is whether the court will ultimately void only the court/jury provision or will, as it did when treating the collateral source statute in Sorrell, deem § 2307.80 void in its entirety.

[223]61 Ohio St. 3d 470, 575 N.E.2d 416 (1991).

[224]*Id.* at 473, 575 N.E.2d at 419, relying on Preston v. Murty, 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987). *See also* Malone v. Courtyard by Marriott L.P., 74 Ohio St.3d 440, 659 N.E.2d 1242 (1996) addressing the malice standard in a tort action and reiterating the rule that the trial judge can direct a verdict denying punitive damages as a matter of law. The second definition is the most likely to apply in connection with product liability actions. *Accord* Miles v. Kohli & Kaliher Assocs., 917 F.2d 235 (6th Cir. 1990) (inadequate evidence that manufacturer knew its product created a great probability of substantial harm or made a deliberate decision to market its product with knowledge of the danger).

[225]67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

[226]Nos. 67406, 67604, 1995 Ohio App. LEXIS 3120 (Cuyahoga County July 27, 1995).

causing substantial harm. A directed verdict was upheld where a warning label contained an OSHA standard for scaffolding towers, but did not reflect the Ohio standards.

Long v. Sun Ray Stove Co.[227] An award of punitive damages was upheld for burn injuries sustained by a child who placed her hand on an oven door. Three facts combined to support the award: the manufacturer was aware that its oven did not meet forthcoming standards, technology to reduce the surface temperature was available, and there was a conscious decision not to warn of the hazard.

IV. CORPORATE CONCERNS

A. *Successor Corporation Liability*

Corporations which purchase the assets of another company are frequently targeted in litigation arising from defects in products manufactured and sold by the predecessor company. *Flaugher v. Cone Automatic Machine Co.*,[228] the leading Ohio decision addressing the liability of such a purchasing company, retained the traditional business based rules preventing imposition of liability absent one of four specific exceptions. This decision also rejected expansion of corporate successor liability based on the "product line" theory initially adopted in California.[229]

The defendant in *Flaugher* had purchased the assets of several companies and continued to manufacture and sell the predecessor's Conomatic machines. Plaintiff alleged injury caused by negligent design and manufacture of the machine.[230]

In affirming a motion to dismiss, the court found that the facts failed to show the presence of any of the four exceptions to the general principle immunizing successors from such liability. A purchaser of corporate assets is not liable for defective products manufactured or marketed by the tortious conduct of its predecessor unless:

1. the buyer expressly or impliedly agrees to assume such liability; or
2. the transaction represents a de facto consolidation or merger; or
3. the buyer corporation is merely a continuation of the seller; or

[227]No. 85-CA-44, 1986 WL 9675 (Ohio Ct. App. Miami County Sept. 2, 1986).

[228]30 Ohio St. 3d 60, 507 N.E.2d 331 (1987). *Accord* Welco Indus. Inc. v. Applied Cos., 67 Ohio St. 3d 344, 617 N.E.2d 1129 (1993) (contractual obligations rather than products liability theory).

[229]*Flaugher*, 30 Ohio St. 3d at 65-67, 507 N.E.2d at 336-37, rejecting the approach announced in Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977) as a "far-reaching and radical departure from traditional principles, such that its adoption is a matter for the legislature rather than the courts." *Id.* at 66-67, 507 N.E.2d at 337.

[230]A failure to warn claim was also presented.

4. the transaction is entered into fraudulently for the purpose of escaping liability.[231]

In its opinion, the court discussed an expanded form of the mere continuation exception. This principle, which was not adopted, is based on whether the seller went out of business at the time of sale, whether all assets were purchased, and whether officers and directors of the seller assume executive positions with the purchaser. Other courts have, nevertheless, applied the expanded definition.[232]

Flaugher analysis is inapplicable to stock purchases through which the selling company becomes a subsidiary of the purchaser. In such cases liability will be determined by traditional rules as to whether the corporate veil can be pierced.

Additional Decisions

Davis v. Loopco Industries.[233] Summary judgment was improper as there were fact issues as to whether the asset purchase agreement provided for successor liability.

Morrison v. Newaygo Engineering & Survey Co.[234] Noting that the hallmark of a de facto merger is an exchange of assets for stock, the court reversed summary judgment for the defendant as a reasonable jury could find that the Plan and Agreement of Reorganization was more than a purchase of assets and could constitute a merger. However, summary judgment for defendant in regard to the mere continuation exception was affirmed as this theory requires the continuation of the corporate entity, not the business operation.

Carpenter v. Shape Form, Inc.[235] A corporation which repaired and maintained a press was not liable even though the repair company and the owning company were incorporated by the same person. The facts failed to come within any of the four exceptions to immunity.

Burr v. South Bend Lathe, Inc.[236] A successor corporation was not liable where the companies dealt at arm's length, there was no commonality among officers or shareholders, and there was no assumption of liabilities.

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[231] *Flaugher*, 30 Ohio St. 3d at 66, 507 N.E.2d at 334. *Cf.* Deaconess Home Ass'n v. Turner Constr., 38 Ohio Misc. 2d 17, 526 N.E.2d 1368 (C.P. 1986) (applying a similar rule to architectural services while rejecting a continuation theory).

[232] *E.g.*, Hoover v. Recreation Equip. Corp., 763 F. Supp. 210 (N.D. Ohio 1989); Morgan v. Hollywood Bases, Inc., No. 61609, 1993 Ohio App. LEXIS 201 (Cuyahoga County Jan. 21, 1993).

[233] 66 Ohio St. 3d 64, 609 N.E.2d 144 (1993).

[234] No. 66023, 1994 Ohio App. LEXIS 2369 (Cuyahoga County June 2, 1994).

[235] No. CA89-07-010, 1990 Ohio App. LEXIS 219 (Madison County Jan. 16, 1990).

[236] 18 Ohio App. 3d 19, 480 N.E.2d 105 (1984). *Accord* McGaw v. South Bend Lathe, Inc., 74 Ohio App. 3d 8, 598 N.E.2d 18 (1991).

B. Industry-Wide Liability

An injured person may be unable to identify the manufacturer of an allegedly defective product which caused the injury. Cases seeking to impose industry-wide liability focus on products of a generic nature such as asbestos, drugs, and lead based paints. The illnesses associated with these products often manifest years after exposure making it difficult or impossible to obtain the data necessary to identify their suppliers or manufacturers. Efforts to establish liability without specific identification of the manufacturer of the product reflect a variety of approaches. The need to identify the actual tortfeasor is an aspect of causation which is often labeled "cause in fact" to distinguish it from proximate cause.

The difficulty of identifying an actual tortfeasor, where it is known that one of a small number of possible parties is responsible for the harm, has been obviated by the doctrine of "alternative liability." This burden of proof shifting doctrine provides that where the conduct of more than one party is tortious and has caused harm, but there is uncertainty as to which party was the cause, the burden is upon each defendant to prove that it is not the responsible party. Each defendant that fails to meet this burden is jointly and severally liable.[237] Application of this principle requires that all of the possibly tortious parties be before the court. An often cited decision holding that this approach is inadequate for product liability actions and creating a distinct form of action is *Sindell v. Abbott Laboratories*.[238] Both before and after *Sindell* variations on this theme have been recognized in product liability litigation.[239]

The Ohio Supreme Court has had several opportunities to adopt a far reaching doctrine for imposition of industry-wide liability upon manufacturers of generic products. It has either rejected the proffered doctrine or determined that a given doctrine was not applicable to the facts. Nevertheless, the court has given indications that the door to such an approach is not fully closed. A 1987 decision, while rejecting market share liability and alternative liability to support a claim for asbestos related injury, concluded: "[W]e hold that alternative liability is not applicable to the facts of this case. Even if we were to

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[237]Summers v. Tice, 199 P.2d 1 (Cal. 1948); RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

[238]607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980), adopting the theory of "market share" liability to allow plaintiffs to proceed in an action against various manufacturers of Diethylstilbesterol (DES), a generic drug.

[239]*See, e.g.*, Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (enterprise liability); Hymowitz v. Eli Lilly and Co., 539 N.E.2d 1069 (N.Y. 1989) (National Market Share); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984) (Probalistic causation or market share alternative); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis.), *cert. denied sum nom., E.R. Squibb & Co. v. Collins*, 469 U.S. 826 (1984) (Risk Share); RESTATEMENT (SECOND) OF TORTS § 876 (1965) (concerted action).

recognize market-share liability as a viable theory of recovery, this is not the case in which to do so."[240]

Ohio's approach to industry-wide liability is well illustrated in *Horton v. Harwick Chemical Corp.*[241] Plaintiffs alleged that exposure to asbestos products at their workplace caused them to suffer from pleural thickening. Suit was brought against a number of asbestos manufacturers and suppliers. The court reversed a summary judgment because the lower courts took an overly restrictive view of proximate cause.[242] Nevertheless, its holding on the application of alternative liability, affirming the appellate court on this issue, was described as ending asbestos litigation.[243]

The court reiterated its allegiance to alternative liability as previously adopted in *Minnich v. Ashland Oil Co.*[244] This principle was described as "a unique theory to be employed in unique situations."[245] Alternative liability cannot be imposed if the defendants' products do not present a substantially similar risk of harm. As there was no evidence of this similarity, the appellate court ruled correctly on this issue.[246]

Additional Decisions

Grover v. Eli Lilly and Co.[247] Like *Sindell*, this case is predicated on harm caused by exposure to DES. However, the claim here involved ingestion of the drug by the maternal grandmother on the theory that this caused the mother to sustain injury to her reproductive organs which, in turn, led to the premature birth of plaintiff and his birth defects. The court ruled that liability for distribu-

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[240]Goldman v. Johns-Manville Sales Corp., 33 Ohio St. 3d 40, 52, 514 N.E.2d 691, 702 (1987).

[241]73 Ohio St. 3d 679, 653 N.E.2d 1196 (1995).

[242]*Id.* at 686, 653 N.E.2d at 1202.

[243]*Id.* at 689, 653 N.E.2d at 1203; (Douglas, J. concurring in part and dissenting in part).

[244]15 Ohio St. 3d 396, 473 N.E.2d 1199 (1984). (adopting alternative liability as set forth in Summers v. Tice, 199 P.2d 1 (Cal. 1948) and the Restatement in an action where plaintiff's injury was caused by one of two possible suppliers of a solvent and both were before the court).

[245]*Horton*, 73 Ohio St. 3d at 688, 653 N.E.2d at 1203.

[246]*Id.* Furthermore, the court again announced that its earlier decision did not foreclose the possibility of applying alternate liability to asbestos litigation where it could be shown that each defendant acted tortiously. *Id.* at 687, 653 N.E.2d at 1202-03, relying on Goldman, 33 Ohio St. 3d at 46, 514 N.E.2d at 696.

[247]63 Ohio St. 3d 756, 591 N.E.2d 696 (1992). This decision does not address theories of industry-wide liability, but is included as the facts do not make clear that the identity of the actual manufacturer was known. It appears that had plaintiff succeeded on the duty issue, alternative liability or other industry-wide theories would have had to be addressed.

tion and manufacture of a prescription drug does not extend to persons who were not exposed to the drug, either directly or in utero.[248]

Goldman v. Johns-Manville Sales Corp.[249] This case represents the leading decision as to application of alternative liability principles in product liability litigation. The court recognized the doctrine, but held that it could not be applied because (1) plaintiff was unable to lay the necessary foundation as to the presence of all tortious parties and (2) not all forms of asbestos created substantially similar risks of harm. Market share liability was not a viable theory as it could not be shown that the forms of asbestos to which plaintiff was exposed were fungible. The absence of fungibility distinguished this asbestos case from DES based litigation.

Jackson v. Glidden Co.[250] In this class action suit,[251] alleging lead poisoning from exposure to paint and paint products, the court impliedly held that neither enterprise liability, market share liability, nor alternative liability substitute for proof that a defendant's product was the proximate cause of harm. This ruling did not preclude the court from denying a motion to dismiss as to two of the three industry-wide theories pled by the plaintiffs.

Enterprise liability[252] was inapplicable as plaintiff did not allege that defendants were jointly aware of the risk or that in their joint capacity they could have reduced that risk. This claim was properly dismissed.

Market share liability, as defined in *Sindell*, was recognized as a cause of action. Plaintiffs' allegations that lead paint and lead paint products were completely fungible and that a substantial share of all producers in Ohio were before the court, were sufficient to overcome the motion to dismiss.

Alternative liability was also available as a cause of action. Plaintiffs' allegations that defendants committed tortious acts and that they were injured as a result were sufficient to overcome the motion to dismiss even though not all potential defendants were joined.

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[248]Relying, in part, on Enright v. Eli Lilly & Co., 570 N.E.2d 198 (N.Y), *cert. denied*, 502 U.S. 868 (1991) (rejecting a similar claim despite this court's acceptance of national market share liability in Hymowitz).

[249]33 Ohio St. 3d 40, 514 N.E.2d 691 (1987).

[250]98 Ohio App. 3d 100, 647 N.E.2d 879 (1995). *See also In re Eagle-Picher Indus. Inc.*, 185 B.R. 42, 27 Bankr. Ct. Dec. 472 (S.D. Ohio 1995) (a lead paint case denying recovery against five defendants, based on a Massachusetts decision, as to allow recovery would create a substantial possibility that tortfeasors and innocent actors would be intermingled); Andonian v. A.C. & S. Inc., 97 Ohio App. 3d 572, 647 N.E.2d 190 (1994) (rejecting concert of action for lack of knowledge in an asbestos based action); Tirey v. Firestone Tire & Rubber Co., 33 Ohio Misc. 2d 50, 513 N.E.2d 825 (C.P. 1986) (rejecting alternative liability, market-share liability, enterprise liability, and a concert of action theory in a case predicated on injuries caused by multipiece wheel).

[251]The question of class certification was deferred pending resolution of a motion to dismiss.

[252]As defined in Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

Fiorella v. Ashland Oil, Inc.[253] The suppliers of benzene to plaintiff's employer obtained summary judgment as plaintiff failed to join all suppliers as defendants thereby failing to establish a predicate for application of alternative liability.

C. *Component Manufacturers*

The provider of manufactured parts used to assemble a larger product is treated as a manufacturer rather than a supplier. The statutory definition of manufacturer includes those who "rebuild a product or a component of a product."[254] This categorization has several important ramifications to component manufacturers including: (1) that they are subject to suit by product liability claimants in the same manner as any other manufacturer; (2) the potential for indemnity claims between the manufacturer/assembler ("assembler") of the finished product and its component part providers; and (3) a "component supplier" defense.

Direct actions against component manufacturers are based on defects in the component part which cause the completed product to fail and cause injury. These actions, from the perspective of the claimant, are identical to claims against any manufacturer. In many cases where a claimant brings suit against the assembler, that claimant could also have brought suit directly against the component supplier.[255] Such a fact pattern is illustrated by *Anderson v. Olmstead Utility Equipment Co.*[256]

Anderson, though decided under the common law, addressed when a component manufacturer will be treated as a manufacturer[257] rather than a supplier as well as aspects of the indemnity issue as between a component manufacturer and an assembler. This action was commenced by workers who

[253] 92 Ohio App. 3d 411, 635 N.E.2d 1306 (1993). *See also* Shea v. BASF Corp., No. 11-95-2, 1995 Ohio App. LEXIS 3264 (Paulding County Aug. 8, 1995) (Plaintiff's failure to establish that any defendant committed the tortious act was a failure to establish an essential element of alternative liability).

[254] OHIO REV. CODE § 2307.71(O). The terms "supplier" and "manufacturer" are mutually exclusive. Brown v. McDonald's Corp., 101 Ohio App. 3d 294, 655 N.E.2d 440 (1995); State Farm Fire & Cas. Co. v. Kupanoff Imports, Inc., 83 Ohio App. 3d 278, 614 N.E.2d 1072 (1992).

[255] Nevertheless, claimants often bring suit only against the assembler because they do not learn the identity or role of a component manufacturer until discovery is taken. A claimant may also limit the designated defendants for tactical reasons.

[256] 60 Ohio St. 3d 124, 573 N.E.2d 626 (1991). *See also* Cleveland Bd. of Educ. v. Fry, 22 Ohio App. 3d 94, 489 N.E.2d 294 (1984) (indemnity action against manufacturer of allegedly defective roofing materials).

[257] Whether a defendant is a manufacturer or a supplier (who benefits from the protections afforded by Ohio Rev. Code § 2307.78) is a question of law. Chaney v. Newco of Janesville, Inc., No. 9-91-45, 1992 Ohio App. LEXIS 3232 (Marion County June 16, 1992); Vercellotti v. YMCA, No. L-91-121, 1992 Ohio App. LEXIS 2340 (Lucas County May 8, 1992).

were injured when a rebuilt "cherry picker" failed causing them to fall to the ground. Olmstead Utility Equipment ("Olmstead") rebuilt the aerial system of the cherry picker truck and installed the rebuilt system pursuant to a contract with the owner which called for a full tear down of the system and replacement of necessary parts. The device failed due to an alleged defect in the components of its hydraulic lift system which had been manufactured by third party defendants.

Olmstead, through its remanufacturing and rebuilding of the system, was a seller and a manufacturer and was, therefore, subject to liability under theories of strict liability in tort as well as breach of contract.[258] As a manufacturer of the completed system, Olmstead had a right to seek indemnity from the component manufacturers if it could prove that the system failure was caused by a defect in a part they manufactured or supplied. The court reasoned that:

> [i]f one of the components in the finished product is defective, then the finished product may become defective as a result. . . . If a component part manufacturer or supplier creates the danger by placing the product into the stream of commerce, liability can, in certain situations, be shifted away from the manufacturer of the finished product.[259]

A different approach applies when an injured party brings suit directly against a component manufacturer who then asserts that it is not subject to liability for a defect in the final product—the component supplier defense. This defense is asserted where there was no defect in the component part and the harm was caused by a system design failure as illustrated in *Kremer v. Durion Co.*[260] Plaintiff was sprayed by nitric acid which was released through an open plug valve, manufactured by Durion, that was incorporated into the design of a holding tank. The valve functioned within its design parameters, but plaintiff claimed that it should have contained a retardation system that would have prevented its being left open. Durion argued that the valve was manufactured for the transmission of all types of liquids and was for sale on the open market. In addition, Durion lacked knowledge as to how the valve would be used or what fluids would be transmitted through it.

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[258]That title to the truck remained with its owner had no relevance to this determination. Discussion of contractual rights between the parties is beyond the scope of this article.

[259]*Anderson,* 60 Ohio St. 3d at 131, 573 N.E.2d at 633.

[260]40 Ohio App. 3d 183, 532 N.E.2d 165 (1983). *See also* Griffin v. Heinz U.S.A., No. C-88-7486, slip op. (N.D. Ohio 1989) (tomato elevator is part of the larger tomato processing system and the elevator manufacturer had no duty to warn of dangers associated with elevator maintenance); Searls v. Doe, 29 Ohio App. 3d 309, 505 N.E.2d 287 (1986) (manufacturer of a can ejector device installed into an assembly line not liable for failure to warn of dangers of the overall system). *Accord* Williams v. Morgan Adhesives Co., No. 13411, 1988 Ohio App. LEXIS 1590 (Summit County Apr. 27, 1988).

The court ruled that the valve was not, in and of itself, dangerous or defective. Rather, it functioned in the manner for which it was designed. Durion could not anticipate how this valve would be utilized and there was nothing unique in its design. As a component supplier, in such circumstances, Durion could not be liable for the manner in which the assembler incorporated the valve into the holding tank system.[261]

Additional Decisions

Schaffer v. A.O. Smith Harvestore Products, Inc.[262] Relying on *Brennaman v. R.P.I. Inc.*,[263] the court held that the manufacturer of a non-defective component part has no duty to warn of dangers that may result when the part is integrated into another product or system where the component manufacturer was not involved in the design or assembly of the integrated end product.

Jacobs v. E.I. Du Pont De Nemours & Co.[264] Du Pont, the supplier of plastics used in the manufacture of a jaw implant, was deemed a component part manufacturer with no duty to warn end-users of the finished product of its potentially dangerous nature. The duty to warn does not extend to speculative anticipation of how non-defective components can become dangerous when integrated into a final product. Suppliers of raw materials are not guarantors of finished products over which they have little control.

Leibreich v. A.J. Refrigeration, Inc.[265] Summary judgment was denied to the supplier of components used in the assembly of a refrigerated delivery truck where that supplier played a role in the truck's design and assembly. Whether the supplier was subject to strict liability as a manufacturer was a fact question. Although the cause of action arose prior to the effective date of the Act, the court relied on the definition of manufacturer contained in Ohio Revised Code section 2307.01(I).

D. Exceptions to Workers' Compensation Immunity

Consistent with the mandate of Section 35, Article II of the Ohio Constitution, Ohio Revised Code section 4123.74 provides that employers who comply with the provisions of the Workers' Compensation Act[266] "shall not be liable to respond in damages at common law or by statute for any injury, occupational

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[261]The court rejected the assertion that the absence of a retardation system rendered the valve defective and also rejected a claim of liability predicated on failure to warn.

[262]No. 74 F.3d 722 (6th Cir. 1996). The opinion can also be read as suggesting that component manufacturers cannot be strictly liable for a design defect absent proof that such a defect existed and that it, as distinct from the end product, was a proximate cause of the harm.

[263]70 Ohio St. 3d 460, 639 N.E.2d 425 (1994).

[264]67 F.3d 1219 (6th Cir. 1995).

[265]67 Ohio St. 3d 266, 617 N.E.2d 1068 (1993).

[266]OHIO REV. CODE §§ 4123.01-4123.94.

disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment . . ."

The scope of this immunity became an issue when the courts developed two theories—the "dual capacity" doctrine and an expanded definition of intentional tort—which permit an employee to bring a tort action in addition to a workers' compensation claim. The Ohio Supreme Court reconsidered and rejected the dual capacity doctrine in *Schump v. Firestone Tire & Rubber Co.*,[267] which abolished this method of circumventing workers' compensation immunity in product liability based cases.[268]

Perhaps no common law development better illustrates the clash between judicial and legislative objectives than does the history of the intentional tort exception to workers' compensation immunity. As many intentional tort actions involve product related injuries, this doctrine bears a direct correlation to product liability law. Since the decision in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*[269] established the doctrine in 1982, the General Assembly has passed three Acts directed to limiting its application. The first two Acts have been declared unconstitutional.[270] The third effort took effect on October 1, 1995.

This Act provides for a one year statute of limitations with a discovery rule.[271] It further provides that an employer is liable if there is proof "by clear and convincing evidence that the employer deliberately committed all of the elements of an intentional tort."[272] An "employment intentional tort" means "an act committed by an employer in which the employer deliberately and

[267]44 Ohio St. 3d 148, 541 N.E.2d 1040 (1989); *followed* Smith v. Taylor Rental, 747 F.Supp. 413 (S.D. Ohio 1990). This doctrine defeats workers' compensation immunity by recognizing that an employer can act in two distinct roles. When acting in the first role, that of an employer, the immunity attaches. When acting in the second role, that of a manufacturer marketing goods to consumers - thereby undertaking unrelated and independent obligations - the immunity does not attach. Thus, if an employee is injured by a product manufactured by his or her employer, in the course of his or her employment, the doctrine permits a tort action. Schump held that an employee injured by a product manufactured and sold by his or her employer can sue the employer only when injured as a member of the public *i.e.*, when acting outside the scope of employment.

[268]*Cf.* Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978) (hospital-medical malpractice). This limited use of dual capacity will, no doubt, be subject to challenge based on the reasoning set forth in Schump.

[269]69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982).

[270]OHIO REV. CODE § 4121.80, effective August 22, 1986 was held unconstitutional in Brady v. Safety-Kleen Corp., 61 Ohio St. 3d 624, 576 N.E.2d 722 (1991); the provisions of Am. Sub. H.B. 107, passed in July, 1993 were held unconstitutionally enacted in State *ex rel.* Ohio AFL-CIO v. Voinovich, 69 Ohio St. 3d 225, 631 N.E.2d 582 (1994).

[271]OHIO REV. CODE § 2305.112.

[272]OHIO REV. CODE § 2745.01.

intentionally injures, causes an occupational disease, or death of an employee."[273]

Blankenship held that an employee is not precluded from enforcing common law remedies against his employer for an intentional tort. The complaint alleged that employees had become sick by exposure to toxic substances in the workplace and that the employer, with knowledge of the conditions, took no steps to correct them and failed to warn employees of the danger. The trial and appellate court decisions dismissing the complaint based on workers' compensation immunity were reversed. The court held that it is for the trier of fact to initially determine whether the alleged conduct constituted an intentional tort. No definition of the term was provided, but it clearly meant something more expansive than traditional assault or battery.

The definitional void was filled through the opinion in *Jones v. VIP Development Co.*[274] The court rejected the proposition that a specific intent to injure is necessary to support a finding of intentional misconduct. Such intent exists when an act is "committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur."[275] The element of substantial certainty is used to distinguish merely negligent conduct from intentionally tortious conduct. Guidance was provided by the court's recognition of a three level conduct analysis:

> Where a defendant acts despite his knowledge that the risk is appreciable, his conduct is negligent. Where the risk is great, his actions may be characterized as reckless or wanton, but not intentional. *The actor must know or believe that harm is a substantially certain consequence of his act before intent to injure will be inferred. [This intent] may be inferred from his conduct and the surrounding circumstances.*[276]

As of October 31, 1995 the intentional tort exception to workers' compensation immunity is defined and limited by Ohio Rev. Code section 2745.01. Decisional law, most likely consistent with past precedents, will govern this section's interpretation and application. Whether it will withstand likely constitutional challenge remains an open question.

Additional Decisions

Cantrell v. GAF Corp.[277] A judgment in favor of plaintiffs for their fear of an increased risk of cancer based on workplace exposure to asbestos was upheld

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[273]OHIO REV. CODE § 2745.01(D)(1). Additional devices to limit the bringing of such actions, including the use of summary judgment and the power to impose sanctions upon attorneys for noncompliance with specified procedures, are set forth in part (C) of this section.

[274]15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).

[275]*Id.* at 95, 472 N.E.2d at 1051.

[276]*Id.* at 95, 472 N.E.2d at 1050 (emphasis added).

[277]999 F.2d 1007 (6th Cir. 1993).

under the intentional tort exception to workers' compensation immunity. There was sufficient evidence to allow a jury determination consistent with Ohio law. The evidence went beyond failure to warn and included testimony that defendant, with knowledge that injury and even death were substantially certain to occur from asbestos exposure, continued to expose employees to asbestos and failed to advise employees of the results of medical screening tests.

Fyffe v. Jeno's, Inc.[278] Plaintiff was injured during the operation of a conveyor belt after the employer had removed a Plexiglass safety guard. The court reversed a summary judgment in favor of the employer on the grounds that there were sufficient facts to permit a jury to ascertain whether the requisite intent for an intentional tort was present. The analysis of intentional tort standards was predicated on *Blankenship-Jones* as explained in *Van Fossen v. Babcock & Wilcox Co.*[279]

Wedge Products, Inc. v. Hartford Equity Sales Co.[280] An insurance policy which provided coverage for bodily injuries "neither expected nor intended" by the employer was inapplicable to intentional tort actions brought by employees injured during the operation of punch presses. This interpretation of the contract was supported by the public policy against insuring for loss caused by intentional torts.

Holtz v. Schutt Pattern Works Co.[281] Summary judgment in favor of the employer was reversed where there was evidence that the conduct surrounding an employee's injury, sustained while operating a jointer wood stripping machine lacking an available safety device, could permit a reasonable jury to find that the injury was substantially certain to occur.

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[278] 59 Ohio St. 3d 115, 570 N.E.2d 1108 (1991).

[279] 36 Ohio St. 3d 100, 522 N.E.2d 489 (1988). *See also* Shannon v. Waco Scaffolding & Equip., Nos. 67406, 67604, 1995 Ohio App. LEXIS 3120 (Cuyahoga County July 27, 1995) relying on Van Fossen to hold that proven violations of safety regulations do not necessarily establish an intent to harm.

[280] 31 Ohio St. 3d 65, 509 N.E.2d 74 (1987).

[281] 89 Ohio App. 3d 663, 626 N.E.2d 1029 (1993). Numerous decisions have reviewed intentional tort claims. *See, e.g.*, Tulloh v. Goodyear Atomic Corp., 62 Ohio St. 3d 541, 584 N.E.2d 729 (1992); *after remand*, 93 Ohio App. 3d 740, 639 N.E.2d 1203 (1994) (hazardous materials); Magness v. Poellnitz, No. C-941018, 1995 Ohio App. LEXIS 5029 (Hamilton County Nov. 15, 1995) (as related to co-employee assault and battery); Brunn v. Valley Tool & Die, Inc., No. 68811, 1995 Ohio App. LEXIS 4992 (Cuyahoga County Nov. 9, 1995) (power press); Stump v. Industrial Steeplejack Co., No. 66937, 1995 Ohio App. LEXIS 1935 (Cuyahoga County May 11, 1995) (scaffold and rope grab); Reese v. Euclid Cleaning Contractors, Inc., 103 Ohio App. 3d 141, 103 N.E.2d 141 (1995) (safety belt); Felden v. Ashland Chem. Co., 91 Ohio App. 3d 48, 631 N.E.2d 689 (1993) (forklift collision); Volter v. C. Schmidt Co., 74 Ohio App. 3d 36, 598 N.E.2d 35 (1991) (press brake).

V. EXPERT WITNESSES AND EVIDENCE

A. *Experts and Scientific Evidence*

In product liability litigation it is a virtual necessity that expert testimony be provided to establish the existence of a manufacture or design defect.[282] The burden of proof in such cases, and the nature of the required evidence, compels the presentation of opinion evidence from a qualified expert as the fact to be ascertained is usually beyond the knowledge of an average juror.[283] In product liability actions compliance with the mandate of Ohio Rule of Evidence 702(A), that expert testimony is permitted only when it "either relates to matters beyond the knowledge or expertise possessed by lay persons or dispels a misconception common among lay persons,"[284] is virtually a given. Only in rare cases will there be sufficient circumstantial evidence to permit a defect issue to reach the jury without expert testimony.[285]

These principles are illustrated in *Dent v. Ford Motor Co.*[286] where, after a motion in limine precluding plaintiff's expert from testifying was granted, an automobile manufacturer was awarded partial summary judgment because there was no evidence to support plaintiff's defect allegations. Similarly, summary judgment was affirmed in favor of a tire manufacturer for harm caused by a tire that exploded during mounting. Plaintiff admitted that he had not obtained a verbal opinion as to the cause of the alleged defect and his own expert apparently found no defect. Absent qualified expert testimony to esta-

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[282]Failure to comply with discovery mandates, pursuant to either Local Rules of Court or the Ohio Rules of Civil Procedure, can have drastic effects. *See, e.g.*, Shumaker v. Oliver B. Cannon & Sons, Inc., 28 Ohio St. 3d 367, 504 N.E.2d 44 (1986) (testimony as to the causal link between chemical exposure and pancreatic cancer improperly admitted as the claim was not disclosed); Tritt v. Judd's Moving & Storage, Inc., 62 Ohio App. 3d 206, 574 N.E.2d 1178 (1990) (excluding surprise testimony of accident reconstructionist). Expert testimony may be excluded as a sanction for violation of OHIO R. CIV. P. 26. Jones v. Murphy, 12 Ohio St. 3d 84, 465 N.E.2d 444 (1984). *But see* Downs v. Quallich, 90 Ohio App. 3d 799, 630 N.E.2d 775 (1993) (allowing allegedly surprise testimony, consistent with the Civil Rules and a Local Rule of Court, where adequate notice was deemed provided through the expert's report and deposition testimony).

[283]Hynes v. Cooper Tire & Rubber Co., No. 5-87-22, 1988 Ohio App. LEXIS 3082 (Hancock County July 15, 1988).

[284]This language replaces the earlier mandate that expert testimony could be utilized where such knowledge would "assist the trier of fact to understand the evidence or to determine a fact in issue." As the new languge reflects prior decisional law defining "assist the trier of fact," it is intended to clarify existing law rather than make a substantive change. *See* OHIO R. EVID. 702, Staff Note.

[285]*See* Grover Hill Grain Co. v. Baughman-Oster Inc., 728 F.2d 784 (6th Cir. 1984) (circumstantial evidence sufficient to raise a jury issue as to the cause of a silo collapse).

[286]83 Ohio App. 3d 283, 614 N.E.2d 1074 (1992).

blish the existence of defect, plaintiff was unable to make a sufficient prima facie case.[287]

1. Qualification of the Expert Witness

Before expert testimony as to the existence of a defect can be presented, the trial court must ascertain whether the witness is qualified as an expert. Analysis begins with Ohio Rule of Evidence 104(A) which delegates responsibility to the trial court to determine preliminary questions as to qualification of persons to be witnesses, the existence of privilege, and the admissibility of evidence. In addition, Ohio Rule of Evidence 702(B) provides that a witness can qualify as an expert by virtue of "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." The rule is consistent with prior law.[288] From this broad statement several principles have been derived:

1. The expert need not be the best expert or have the best credentials;[289]
2. The expert need not be completely or extensively knowledgeable in the subject;[290]
3. The expert can testify only as to a part of the total information required;[291]
4. The necessary expertise can be based on sufficient experience without regard to specialized training or education;[292] and

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[287]Hodgkinson v. Dunlop Tire & Rubber Corp., 38 Ohio App. 3d 101, 526 N.E.2d 89 (1987). *See also* Chaplynski v. Van Holle, No. CA91-08-060, 1992 Ohio App. LEXIS 1929 (Clermont County Apr. 13, 1992) (applying OHIO REV. CODE § 2307.73).

[288]The Staff Note indicates that Rule 702(B) codifies State v. Koss, 49 Ohio St. 3d 213, 551 N.E.2d 970 (1990) (evidence not admissible when knowledge is within the ken of the jury); State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795, *cert. denied*, 479 U.S. 871 (1986) (evidence admissible if sufficiently beyond common experience); and State v. Thomas, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (evidence inadmissible if not beyond the ken of the average lay person). *See also* Weil v. Este Oils Co., 93 Ohio App. 3d 759, 639 N.E.2d 1215 (1994) (court may exclude expert testimony which is neither complex nor beyond comprehension of the average person). Note: This article presents Ohio law. Unless otherwise indicated, no discussion of the Federal Rules of Evidence will be presented. The Federal Rules differ significantly from the Ohio Rules as exemplified in Rule 702 (testimony of experts) and Rule 705 (disclosure of underlying data - hypothetical questions).

[289]*See* Scott v. Yates, 71 Ohio St. 3d 219, 643 N.E.2d 105 (1994); State v. Tomlin, 63 Ohio St. 3d 724, 590 N.E.2d 1253 (1992).

[290]Mullins v. Clark Equip. Co., No. 14426, 1994 Ohio App. LEXIS 4832 (Montgomery County Oct. 26, 1994); Higginbotham v. Perez, No. 93APE12-1711, 1994 Ohio App. LEXIS 3949 (Franklin County Sept. 6, 1994).

[291]Shilling v. Mobile Analytical Servs., Inc., 65 Ohio St.3d 252, 602 N.E.2d 1154 (1992).

[292]Lin v. Khan, No. 93APE-1252, 1994 Ohio App. LEXIS 1900 (Franklin County May 3, 1994). *Cf.* Behanan v. Desco Distrib. Co., 98 Ohio App. 3d 23, 647 N.E.2d 830 (1994)

5. The expert may testify only as to areas within his or her expertise.[293]

Scott v. Yates[294] illustrates the difficulty of ascertaining whether a witness is qualified as an expert. In this 4-3 decision the Ohio Supreme Court held that the trial court abused its discretion in finding that a veteran accident investigator, the Deputy who investigated the accident scene, was qualified to render an opinion as to the cause of the collision. The court focused on both former Ohio Rule of Evidence 702 and Rule 104(A). The Deputy, with a twelfth grade education, attended the police academy which included a two week period devoted to accident investigation. He was not familiar with relevant aspects of the laws of physics and testified that there was a distinction between investigating an accident and reconstructing one, which he had never previously done. The dissenters urged affirmance as the Deputy had investigated over 1500 accidents a year while with the Sheriff's Department, his academy training included determinations as to the cause of an accident, and he had received on the job training regarding "point of impact tracking" and causation.

2. Substantive Requirements

a. Certainty, Basis for Opinion, and Related Requirements

That expert testimony, as any other evidence, must be relevant needs no discussion.[295] Expert evidence must also be specific, reliable, and credible. The recent decision of *Stinson v. England*,[296] a medical malpractice action, addresses

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(working at a dry cleaning establishment for thirty years insufficient to render an expert opinion on design of a pressing machine).

[293]*Mullins*, No. 14426, 1994 Ohio App. LEXIS 4832 (scope of engineer's testimony); Grigsby v. Anesthesiologist of SW Ohio, Inc., No. C-930008, 1994 Ohio App. LEXIS 1814 (Hamilton County Apr. 27, 1994) (nurse anesthetist could testify as to standard of care in administration of anesthesia, but not as to facts of improper administration).

[294]71 Ohio St. 3d 219, 643 N.E.2d 105 (1994). *See also* State v. Clark, 101 Ohio App. 3d 389, 411-414, 655 N.E.2d 795, 808-11 (1995).

[295]*See* OHIO R. EVID. 401, 402. *See also* Deans v. Allegheny Int'l (USA), Inc., 69 Ohio App. 3d 349, 590 N.E.2d 825 (1990) (excluding expert testimony of lawn mower accidents prior to the design of the mower); State v. Clark, 101 Ohio App. 3d 389, 655 N.E.2d 795 (1995). A motion in limine was granted in Owens-Corning Fiberglass Corp. v. American Centennial Ins. Co., 74 Ohio Misc.2d 258, 660 N.E.2d 819 (C.P. 1995), precluding expert state of the art testimony as irrelevant to the question of insurance coverage in this asbestos litigation due to the absence of foundation evidence establishing the insured's intent. This is one of ten rulings made by the court between February, 1993 and September, 1995, in regard to various indemnity, coverage, discovery, and summary judgment issues. The rulings are reported at 74 Ohio Misc.2d 144 - 272, 660 N.E.2d 746 - 828. Questions of application are posed by both OHIO R. EVID. 704 (allowing experts to testify as to ultimate issues of fact) and OHIO R. EVID. 705 (disclosure of facts or inferences underlying the expert opinion).

[296]69 Ohio St. 3d 451, 633 N.E.2d 532 (1994).

the probability rule.[297] This action was brought on behalf of a woman, treated by defendant, and her child. They appealed an adverse jury verdict. Defendants' expert, Dr. Ross, testified that the child's injuries "could be caused by three events: (1) maternal hypertension, (2) placental insufficiency (*i.e.*, the theory of appellants), or (3) compression of the umbilical cord. Of these three possibilities, Dr. Ross stated that the "most likely" cause of the injuries was the compression of the umbilical cord."[298]

In reversing and remanding for a new trial the court reiterated the rule that expert opinion as to causation must be based on probability. Plaintiffs' expert had provided sufficient evidence to raise a prima facie case of negligence. Thus, the defense had to adduce competent evidence to negate that testimony. The testimony of Dr. Ross was insufficient. Expert testimony as to causation is competent only if it specifies the probable cause of the occurrence, not possible causes. Probability means more than a fifty percent likelihood. Testimony that one of three causes is the "most likely" fails to achieve this threshold.[299]

In addition to meeting the probability standard, expert testimony must meet the demand of Ohio Rule of Evidence 703 that the facts or data relied upon by the expert to reach an opinion or inference be "those perceived by him or admitted in evidence at the hearing." This requirement was cogently presented in *Naugle v. Campbell Soup Co.*[300] In this case the plaintiff injured his hand in the rollers of a coating machine used in the manufacture of cans. The machine manufacturer's award of summary judgment was affirmed. Plaintiff's expert submitted an affidavit concluding that the machine was defective and the proximate cause of plaintiff's injury. Nothing in the affidavit stated that it was made on the personal knowledge of the expert. The expert did not examine the machine and had only examined drawings and illustrations depicting it which he had not prepared. The affidavit failed to meet both the personal knowledge requirement of Rule 703 and the basis for opinion requirement of Rule 705.

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[297]This decision also addresses the proper utilization of "learned treatises" as an exception to the hearsay rule. As the Ohio Rules of Evidence have no equivalent to the exception found in FED. R. EVID. 803(18), Ohio law allows the use of learned treatises for purposes of impeachment, but not contradiction. *Stinson*, 69 Ohio St. 3d at 458, 633 N.E.2d at 539.

[298]*Id.* at 454, 633 N.E.2d at 536.

[299]*Id.* at 4456, 4457, 633 N.E.2d at 538. *See also* Shumaker v. Oliver B. Cannon & Sons, Inc., 28 Ohio St. 3d 367, 504 N.E.2d 44 (1986); Dellenbach v. Robinson, 95 Ohio App. 3d 358, 642 N.E.2d 638 (1993) (medical testimony based on "medical probability" admissible as equivalent to "reasonable degree of medical certainty"); Pasala v. Brown Derby, Inc., 71 Ohio App. 3d 636, 594 N.E.2d 1142 (1991) (evidence of future physical and emotional harm excluded as not reasonably certain).

[300]No. 7-84-24, 1986 WL 7312 (Ohio Ct. App. Henry County June 20, 1986). *See also* State v. Solomon, 59 Ohio St. 3d 124, 570 N.E.2d 1118 (1991) (medical testimony in a medical case admissible under Rule 703 and stressing that the rule uses the disjunctive "or" in its allowance of reliance upon "facts or data perceived"). *Id.* at 126, 570 N.E.2d at 1120; Steinfurth v. Armstrong World Indus., 27 Ohio Misc. 2d 21, 500 N.E.2d 409 (C.P. 1986) (construing Rule 703).

b. Reliability - Scientific Evidence a/k/a Galileo's Revenge and Tycho Brahe[301]

Ascertaining whether expert evidence is sufficiently grounded in fact and science as to be admissible has long plagued both state and federal courts. The extent to which Ohio courts applying Ohio Rule of Evidence 702, as amended, will rely on federal precedent is not yet clear. There may be little substantive difference, as distinct from the obvious differences in the Rules as written, between the Ohio Rule and the federal rule as interpreted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[302] Ohio courts rejected the rule of *Frye v. United States*[303] prior to its rejection in *Daubert*. The Staff Note to amended Ohio Rule of Evidence 702 observes that although the Ohio courts had not adopted a definitive test for the reliability requirement, they have rejected *Frye*.[304] The Staff Note also advises that in ascertaining reliability the discussion in *Daubert* may be relevant and "helpful in construing the Ohio rule."

Ohio Rule of Evidence 702 rejects any concept that expert evidence is admissible if relevant with its reliability only treated as a question of weight and credibility for the jury.[305] Prior to adoption of the amendments to Rule 702, a reliability standard existed which permitted exclusion of expert testimony if the court found that either (1) the underlying theory and principles utilized, or (2) their application, were unreliable.[306] Nevertheless, the prior rule suffered from ambiguity and decisional law provided inadequate guidance to the lower courts. The new Rule 702, with its far greater detail, is directed toward resolution of this ambiguity.

In addition to its mandates as to when expert testimony is appropriate and when a person is qualified as an expert, the Rule now provides explicit instruction as to when evidence is reliable. Expert scientific testimony must be based on reliable scientific, technical, or other information. If the testimony relies on the results of any procedure, test, or experiment it is reliable only if:

1. The theory upon which the procedure, test, or experiment is based is objectively verifiable or validly derived from widely accepted knowledge, facts, or principles;
2. The design of the procedure, test, or experiment reliably implements the theory; and

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301 Brahe was the last great astronomer to oppose Copernicus. His story is told in Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565 (N.D. Ill. 1993).

302 113 S. Ct. 2786 (1993).

303 293 F. 1013 (D.C. Cir. 1923).

304 Relying on State v. Pierce, 64 Ohio St. 3d 490, 597 N.E.2d 107 (1992) and State v. Thomas, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

305 This approach was suggested in State v. Pierce despite the court's discussion of the reliability of the principles posited in the case.

306 *See* State v. Bresson, 51 Ohio St. 3d 123, 554 N.E.2d 1330 (1990); State v. Williams, 4 Ohio St. 3d 53, 446 N.E.2d 444 (1983).

3. The procedure, test, or experiment was conducted in a way that will yield an accurate result.[307]

This set of standards parallels the primary focus of *Daubert*. As with the *Daubert* approach, the trial judge will be the "gatekeeper" whose job it is to open or close the gate of admissibility to proposed expert scientific evidence. If the Ohio courts observe the Staff Note suggestion that *Daubert* analysis can be relevant and helpful, a number of detailed inquiries set forth by the Supreme Court will be used to supplement the tri-part approach of Ohio Rule of Evidence 702(C). These inquiries include whether the theory or technique involved: (1) can be (and has been) tested—an empirical element; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error; and (4) is governed by the existence and maintenance of standards controlling the technique's operation.[308] The judge may also, but need not, consider the degree to which the technique or theory has been generally accepted within the relevant scientific community.[309] The focus of these inquiries is directed to the principles and methodology rather than the conclusions they generate.[310] They require that the expert's testimony be based on good, as distinct from perfect, grounds. The trial court gatekeeper can also consider a variety of other factors such as the novelty of the approach and its relation to established procedures, the qualifications of the witness, and non-judicial uses of the approach.[311] Full application of *Daubert* analysis requires a two step approach: first an inquiry as to relevance; second an inquiry into reliability. This approach is similarly mandated by Ohio law.

The meaning of "scientific knowledge," the area in which *Daubert* focuses and applies, was considered in *State v. Clark*.[312] In this criminal proceeding a state witness was called to reconstruct the crime scene through a special computer program. After finding the witness qualified, and the proffered testimony relevant, the court turned to the question of whether this evidence was reliable. Because *Daubert* was predicated on Federal Rule of Evidence 702, which was identical to the former Ohio rule, the essential principles of *Daubert* were summarized. They were found insufficient, however, because crime scene

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[307] OHIO R. EVID. 702(C).

[308] *Daubert*, 113 S. Ct. at 2796-97.

[309] *Id.* at 2797.

[310] *Id.* The Court also stresses that this is to be a flexible standard.

[311] *Paoli R.R. Yard P.C.B. Litig.*, 35 F.3d 717 at 742, n.8 (3d Cir. 1994) (multiple facets of expert testimony in the context of a claim that physical ailments were caused by exposure to polychlorinated biphenyls-PCB's). *See also* United States v. Bonds, 12 F.3d 540 (6th Cir. 1993) (upholding admission of DNA testing in a criminal proceeding); Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993) (allowing evidence relating asbestos exposure to laryngeal cancer).

[312] 101 Ohio App. 3d 389, 655 N.E.2d 795 (1995). Despite the importance of the legal issues and distinctions raised in this opinion, a discretionary appeal was denied. 72 Ohio St. 3d 1548, 650 N.E.2d 1367 (1995).

or accident reconstruction testimony, unlike chemical structure, DNA, and stenographic voice analysis, was deemed within the realm of "technical or other specialized knowledge" rather than scientific knowledge.[313] For such computer modeling the test of reliability is "a sufficient showing that:(1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists."[314] Even though the third element is that of the *Frye* rule, rejected by the Ohio Supreme Court in analysis of scientific knowledge cases, its use was held appropriate in this distinct type of case.

Additional Decisions

Qualifications:

Shilling v. Mobile Analytical Services, Inc.[315] A Ph.D. neurotoxicologist/ psychologist, who was not a physician, could testify as to the diagnosis of a medical condition where the testimony was within his expertise. The witness was competent to testify that the ingestion of gasoline caused injury to the brain and nervous system. That additional testimony might be needed to show the causal link between the brain damage and other symptoms did not negate the ability of this witness to testify in areas of his expertise.[316]

Shannon v. Waco Scaffolding & Equipment.[317] Decisions as to whether a witness is qualified as an expert are reviewed under an abuse of discretion standard. A trial court determination that a witness could testify as to engineering principles, physics, and adequacy of warning in regard to the use of a scaffold was upheld even though the witness had no mechanical or engineering qualifications. The witness's business experience, membership in relevant

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[313]*Id.* 101 Ohio App. 3d at 415, 655 N.E.2d at 812. The court also found, relying on State v. Pierce, 64 Ohio St. 3d 490, 501, 597 N.E.2d 107, 115-16 (1992), that the reliability of expert testimony goes to the weight of the evidence rather than its admissibility. This ruling is inconsistent with amended Rule 702(C).

[314]*Id.* at 416, 655 N.E.2d at 812 quoting Commercial Union Ins. Co. v. Boston Edison Co., 591 N.E.2d 165 at 168 (Mass. 1992). *Cf.* State v. Martens, 90 Ohio App. 3d 338, 629 N.E.2d 462 (1993) (utilizing the "commonly accepted in the community" standard to permit testimony of Post Traumatic Stress Disorder despite recognition that Daubert limits this standard).

[315]65 Ohio St. 3d 252, 602 N.E.2d 1154 (1992).

[316]The court explained that the term "medical witnesses" as used in Darnell v. Eastman, 23 Ohio St. 13, 261 N.E.2d 114 (1970) did not require that a witness be a medical doctor.

[317]Nos. 67406, 67604, 1995 Ohio App. LEXIS 3120 (Cuyahoga County July 27, 1995). *Cf.* Paul v. Moore, 102 Ohio App. 3d 748, 658 N.E.2d 10 (1995) (surveyor and computer-aided drafting operator treated as lay witnesses where their testimony was limited to laying a foundation for exhibits which graphically represented an accident scene).

professional organizations, and familiarity with applicable regulations was sufficient to provide him with greater knowledge than that of an ordinary juror.

Kitchens v. McKay.[318] A trial court determination that an expert was not qualified to address the crashworthiness of a van type vehicle was upheld even though the appellate court might have reached a different conclusion. Although the witness held three degrees, including an Associate Degree in Mechanical Engineering Technology, he lacked relevant studies in physics, had not taught nor published, and his employment experience had little bearing on the issues. The trial court also based its decision on the witness's limited experience with vans and lack of experience in anatomy, physiology, or human injury tolerance.

Substantive Requirements:

Cooper v. Sisters of Charity.[319] This medical malpractice wrongful death action clearly delineates the probability rule. One expert testified that "there is no possible way . . . to ascertain with any degree of certainty whether with medical intervention, the individual would have survived or died."[320] Another testified that although death was certain without surgery "there certainly is a chance and I can't say exactly what-maybe around 50%-that he would survive with surgery."[321] The court, concerned that a lesser standard would permit conjecture and speculation, adopted the rule that causation evidence had to meet the "probability" standard of more likely than not. The testimony was, therefore, insufficient.

McDonald v. Ford Motor Co.[322] Uncontradicted defense testimony asserted that a steering column collapsed, as required by federal regulation, when the vehicle struck a tree. This testimony was consistent with the results of an examination of the column and the court observed that the best direct evidence of a defect in a product is the product itself. The court affirmed a directed verdict by application of the "physical facts" rule to disregard plaintiffs' evidence (of an earlier failure causing loss of vehicle control) as speculative. The Syllabus provides: "The testimony of witnesses which is positively contradicted by the established physical facts is of no probative value and a jury will not be permitted to rest a verdict thereon."[323]

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[318] 38 Ohio App. 3d 165, 528 N.E.2d 603 (1987).

[319] 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971).

[320] *Id.* at 247, 272 N.E.2d at 101.

[321] *Id. See also* Downs v. Quallich, 90 Ohio App. 3d 799, 630 N.E.2d 775 (1993) ("logically" a cause and "may be relevant" inadequate).

[322] 42 Ohio St. 2d 8, 326 N.E.2d 252 (1975). *Cf.* Nationwide Mut. Fire Ins. Co. v. B & B Appliance Co., No. 54107, 1988 Ohio App. LEXIS 2870 (Cuyahoga County July 14, 1988) (expert's admission that he did not investigate other possible sources of a fire that originated in a television set so negated his testimony as to permit a directed verdict).

[323] *McDonald*, 42 Ohio St. 2d at 8, 326 N.E.2d at 252.

Shaw v. Toyotomi America, Inc.[324] Conflicting expert testimony as to the cause of a fire created a fact issue sufficient to defeat summary judgment.

Teetors v. Benson Truck Bodies, Inc.[325] A third-party defendant, the manufacturer of a cylinder hoist installed as part of a truck bed's lift system, was entitled to summary judgment, pursuant to Ohio Revised Code sections 2307.73 and 2307.75, where the expert's affidavit failed to state a specific design or manufacture defect in the cylinder as distinct from a possible defect in the overall system.

Brooks v. Dunn.[326] A motorcycle manufacturer was not entitled to summary judgment where the affidavit in support failed to show personal knowledge of the accident, the mechanical design of the motorcycle, or comparison to other designs.

Bloomer v. Van-Kow Enterprises.[327] Failure of the expert to offer evidence of an economically and mechanically feasible alternative design justified summary judgment.

Reliability:

American & Foreign Insurance Co. v. General Electric Co.[328] Expert testimony of a theory relating to trip testing and trip time functions of a circuit breaker was excluded as inadequate for lack of sufficient evidence as to how the expert conducted his tests.

O'Connor v. Commonwealth Edison Co.[329] Testimony that cataracts resulted from overexposure to radiation at a nuclear power plant was rejected as not based on scientific methodology and unsupported by scientific articles relied upon by the expert.

State v. Thomas.[330] A qualified expert's testimony as to results of DNA testing was reliable. Such evidence is generally accepted by both the scientific community and the courts.

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[324] 101 Ohio App. 3d 54, 654 N.E.2d 1337 (1995).

[325] No. S-93-9, 1994 Ohio App. LEXIS 705 (Sandusky County Feb. 25, 1994). No appeal was taken from the grant of summary judgment to the manufacturer of a hydraulic pump/valve, another component of the lift system, where the expert's affidavit was flawed and he expressed "no opinion" as to a defect during his deposition. Shortest deposition this author ever took.

[326] No. CA-2305, 1985 WL 4495 (Ohio Ct. App. Richland County Dec. 5, 1985).

[327] No. 64970, 1994 Ohio App. LEXIS 1937 (Cuyahoga County May 5, 1994).

[328] 45 F.3d 135 (6th Cir. 1995).

[329] 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994). *See also* Conde v. Velsicol Chem. Corp., 804 F. Supp. 972 (N.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994) (evidence based on questionable data or novel scientific theory).

[330] 63 Ohio App. 3d 501, 579 N.E.2d 290 (1993).

B. Circumstantial Evidence (Ohio Rev. Code section 2307.73(B))

A product may be destroyed at the time of an injury producing event or may be lost or destroyed after that event without fault of the injured party. Absent the allegedly defective product, direct evidence of the defect is unavailable. In such cases a plaintiff is permitted to establish certain elements of a prima facie case through the use of indirect or circumstantial evidence. The approach in product liability litigation is distinct from, though similar to, some aspects of *res ipsa loquitur* in negligence actions. Consistent with judicial precedent,[331] the Ohio Revised Code permits the use of indirect evidence to establish a product defect when direct evidence is not available. This evidence must be otherwise admissible under the Rules of Evidence. In such cases "it shall be sufficient for the claimant to present circumstantial or other competent evidence that establishes . . . that the product in question was defective . . . ."[332]

State Farm Fire & Casualty Co. v. Chrysler Corp.,[333] a well known decision decided prior to the statutory rule, utilized this principle and expressed its limitations as to the totality of the plaintiff's burden of proof. State Farm, the insurer of a vehicle which was destroyed in a fire, brought an action against Chrysler to recover its payment to the automobile owner. Expert witnesses testified as to the probable ignition points, but could not identify the specific defect that caused the fire. Chrysler argued that State Farm failed to demonstrate the existence of a defect in the vehicle when it left the manufacturer's control, which defect proximately caused the harm. Based on a history of vehicle malfunction, the assertion that new cars do not have such problems, and the expert testimony, plaintiff argued that its burden of proof was met. In reaching a conclusion that the trial court's directed verdict was appropriate, the court addressed the use of circumstantial evidence holding that:

> Product defects may be proven by direct or circumstantial evidence. Where direct evidence is unavailable, a defect in a manufactured product existing at the time the product left the manufacturer may be proven by circumstantial evidence where a preponderance of that evidence establishes that the loss was caused by a defect and not other possibilities, although not all other possibilities must be eliminated.[334]

The court reasoned that, as applied to manufacturing defect cases and design defect cases predicated on consumer expectancy, evidence of unsafe unexpected performance is sufficient to infer the existence of a defect. In design defect cases, but not manufacture defect cases, such evidence, in the absence

[331] *See, e.g.*, Friedman v. General Motors Corp., 43 Ohio St. 2d 209, 331 N.E.2d 702 (1975); State Auto Mut. Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973).

[332] OHIO REV. CODE § 2307.73(B).

[333] 37 Ohio St. 3d 1, 523 N.E.2d 489 (1988).

[334] *Id.* at 6, 523 N.E.2d at 493-94.

of a substantial change in the product, also supports the inference that the defect existed at the time of manufacture. Thus, in manufacture defect cases, plaintiff must present additional evidence to prove the defect existed at the time of manufacture and to establish proximate cause. In design cases, plaintiff must present additional evidence to establish proximate cause. Whether any of the allowable inferences are appropriate in design defect litigation based on risk-benefit analysis was not determined.

Efforts to establish a prima facie case of defect through circumstantial evidence can also be made even though the product is available for inspection and testing. This approach is often taken in "sudden acceleration" situations where expert evidence cannot identify the cause of the acceleration. Although courts may find that the circumstantial evidence is sufficient to raise a jury question, juries often reject such claims.[335]

Additional Decisions

Francis v. Clark Equipment Co.[336] Plaintiff asserted that the absence of operator restraints on a forklift established a product defect under both the consumer expectancy and risk-benefit analysis standards. The court recognized that under Ohio law evidence of unsafe, unexpected product performance is sufficient to infer defect. This inference would have applied had the claim been directed to the product's propensity to overturn. As the claim was directed to the absence of a restraint system, further evidence was required to establish a prima facie case of defect.

Harker v. Black & Decker (U.S.), Inc.[337] Plaintiff, who alleged an electrical defect in a power tool, was not entitled to inferences based on circumstantial evidence as she did not refute evidence which demonstrated a strong likelihood that the defect was caused by conduct of either the decedent or another family member.

Gast v. Sears Roebuck & Co.[338] Circumstantial evidence was sufficient to raise a jury question as to the existence of a defect in a television set that caused a fire. The absence of expert testimony as to the precise cause of the defect did not preclude the inference. Evidence that the television set was an "instant start" model which meant there was always a current flow, expert testimony that the

[335] *See, e.g., Friedman*, 43 Ohio St. 2d 209, 331 N.E.2d 702 (2975) (a combination of expert testimony and circumstantial evidence was sufficient to raise a jury question); O'Neill v. Honda Motor Ltd., No. 220665 (Ohio C. P. Cuyahoga County 1994) (defense verdict). [There is no opinion in this case. The citation is based on the author's personal knowledge.]

[336] 993 F.2d 545 (6th Cir. 1993). *Cf.* Grover Hill Grain Co. v. Baughman-Oster, Inc., 728 F.2d 784, 793-94 (6th Cir. 1984) (evidence of a subsequent design change in the bolt pattern and bolts used to assemble a grain bin can be circumstantial evidence of a design defect in the older design).

[337] No. 93-3273, 1994 U.S. App. LEXIS 7439 (6th Cir. Apr. 11, 1994).

[338] 39 Ohio St. 2d 29, 313 N.E.2d 831 (1974).

fire "probably" started in the set, and recognition that defect free sets do not ordinarily start fires, was sufficient.

Cincinnati Insurance Co. v. Volkswagen of America, Inc.[339] As in *State Farm*, a vehicle fire led to payment by an insurance carrier who sought recovery from the vehicle manufacturer. Despite the extensive use of the vehicle (between 70,000 and 80,000 miles) and its age (a 1976 vehicle compared to a 1981 loss), expert testimony that the fire started in the main electrical cable harness was sufficient to permit a jury to infer that the defect existed at the time of vehicle manufacture. The court reasoned that: "*A fire breaking out underneath a dashboard is a circumstance which cries out for explanation.*"[340] This, alone, would permit the jury to make certain inferences. When coupled with the expert testimony, it was not unreasonable for the jury to conclude that the fire arose from a defect. In essence, the court held that a directed verdict was improper as electrical systems do not ordinarily start automobile fires and a consumer would reasonably expect that this would not occur.

C. *Subsequent Remedial Measures*

Ohio Rule of Evidence 407 precludes evidence of subsequent remedial measures in negligence actions. This preclusion is limited to evidence of remedial measures offered to establish negligence or culpability rather than identical evidence proffered for other purposes.[341]

In *McFarland v. Bruno Machinery Corp.*[342] the court refused to extend the wording of the Rule to strict liability actions. After evaluating the competing

[339]29 Ohio App. 3d 58, 502 N.E.2d 651 (1985). *Accord* Nash v. General Elec. Co., 64 Ohio App.2d 25, 410 N.E.2d 792 (1979) (circumstantial evidence, absent proof of abnormal use or prior malfunction, allowed to infer defect in a five year old electric toaster). *See also* Shea v. BASF Corp., No. 11-95-2, 1995 Ohio App. LEXIS 3264 (Paulding County Aug. 8, 1995) (OHIO REV. CODE § 2307.73(B) would not apply to fill gaps as to when or where herbicide contamination occurred); Potts v. Hawkes Hosp., No. 86AP-1146, 1987 WL 11949 (Ohio Ct. App. Franklin County June 2, 1987) (circumstantial evidence that a normally functioning EKG machine does not cause burns raised a fact issue of defect when plaintiff found a burn on her leg after the machine was attached to her leg); Watkins v. S.C. Johnson & Sons, 16 Ohio Misc. 2d 11, 477 N.E.2d 479 (C.P. 1984) (despite plaintiff's affidavit that she did not tamper with or misuse an aerosol can which exploded, *res ipsa loquitur* not available to prove defect).

[340]*Cincinnati Ins. Co.*, 29 Ohio App. 3d at 61; 502 N.E.2d at 654; quoting Vernon v. Lake Motors, 488 P.2d 302, 306 (Utah 1971).

[341]*See, e.g.*, Worrell v. Norfolk & W. Ry. Co., 94 Ohio App. 3d 133, 640 N.E.2d 531 (1994), where, in an action brought pursuant to the Federal Employers' Liability Act, the court permitted evidence of subsequent remedial measures for impeachment purposes. The bar of Ohio Rule of Evidence 407 is inapplicable to evidence offered for purposes other than to show negligence or culpability. This holding is consistent with the wording of the Rule which, by its terms, is inapplicable to evidence offered for other purposes such as proving ownership, control, feasibility of precautionary measures, and impeachment.

[342]68 Ohio St. 3d 305, 626 N.E.2d 659 (1994). This decision effectively overrules opinions limiting the use of subsequent repair or modification evidence in product

policy interests, the court ruled that evidence of subsequent design changes made to a die cutting press should have been presented to the jury on the question of defect. The court reasoned that:

> Such evidence would have been probative of the issue as to whether the machine which caused the injury was safely designed. Proof that Amtex placed a guard on the machine and that appellee changed the design in order to prevent further injuries would be probative of the quality of the machine prior to the time the remedial acts were taken.[343]

Subsequent remedial measure evidence is admissible for any relevant purpose in strict liability actions. The rule and reasoning of *Bruno* have equal application to product liability claims brought pursuant to the Act.

D. Spoliation

Evidence, including an allegedly defective product, can be lost, disposed of, or altered at any time from the date of injury through trial. Spoliation, the destruction of evidence, constitutes a form of obstruction of justice. If spoliation occurs before counsel is involved in the case both sides will have to deal with the resulting evidentiary ramifications.[344] When there is spoliation after counsel is engaged, the ramifications can be even more serious. Typically, after issue is joined counsel for the party that does not possess the product involved (usually the defendant) will obtain a protective order to assure all necessary protections such as maintaining the product in its existing condition and the mutual witnessing of destructive testing.[345]

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liability cases such as LaMonica v. Outboard Marine Corp., 48 Ohio App. 2d 43, 355 N.E.2d 533 (1976). LaMonica held that evidence of subsequent changes in product design and state of the art was not admissible as proof of defect though admissible for the limited purpose of showing that a feasible design alternative existed at the time of manufacture. *Contra* Caggiano v. Medtronics, Inc., 47 Ohio App. 3d 29, 547 N.E.2d 389 (1988) (Rule may be inapplicable to product liability actions as the purpose of the prohibition, product improvement, is not advanced in such cases).

[343]*McFarland*, 68 Ohio St. 3d at 312; 626 N.E.2d at 664.

[344]In addition, an independent tort action for interference with, or destruction of, evidence may be brought. *See* Smith v. Howard Johnson Co., 67 Ohio St. 3d 28, 615 N.E.2d 1037 (1993); Williams v. Dunagan, No. 15870, 1993 Ohio App. LEXIS 2430 (Summit County May 5, 1993).

[345]Breach of such an order can result in the preclusion of any evidence derived from that breach or a dismissal of the action or defense. More limited sanctions will often be applied. *See generally* Bright v. Ford Motor Co., 63 Ohio App. 3d 256, 578 N.E.2d 547 (1990). Courts sometimes disregard protective orders. For example, in a case co-counseled by the author, Midwestern V.W. Corp. v. Ringley, 503 S.W.2d 745 (Ky. Ct. App. 1973), a protective order barred destructive testing of a brake drum. Plaintiff's expert violated the order yet the court admitted the result of his test into evidence. The ruling was not addressed by the appellate court which rendered final judgment for the defense based on the absence of proximate cause.

The principles governing spoliation of evidence and available sanctions are similar under both Ohio and federal law.[346] Spoliation rules applicable in tort actions are an extension of the principles initially applied to allowable inferences following the destruction of documents and to the inference of guilt permitted in criminal cases where evidence was destroyed. The foundation principle was recognized in a wrongful death action.[347] The court indicated both when the doctrine applied and the effect of its violation:

> [W]here relevant evidence which would properly be part of a case is within the control of a party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the jury may draw an inference that such evidence would be unfavorable to him.[348]

Spoliation of evidence can result in a variety of sanctions including preclusion of evidence or dismissal of an action or defense. Sanctions can be applied whether the evidence was spoliated before or after a party had knowledge that litigation was likely and without regard to malice. The applicable sanction will depend on a balancing of the factors which led to the spoliation, the prejudicial effect of allowing or excluding the evidence derived from the spoliation, and other factors deemed relevant by the court. A primary reason for possibly severe sanctions in product liability litigation is that loss of the defective product "is catastrophic to the party who has been denied access to it."[349]

Additional Decisions

Cincinnati Insurance Co. v. General Motors Corp.[350] Defendant sought to limit the testimony of plaintiff's expert because the allegedly defective vehicle, which caught fire, had been destroyed without providing defendant an opportunity to inspect it in its "after the fire" condition. The trial court granted a motion in limine which resulted in a summary judgment as plaintiff could not introduce causation evidence. The court found that where evidence is intentionally or negligently spoiled or destroyed by plaintiff's expert or his counsel before the defense can examine it, a court may preclude any and all

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[346]Federal rules are summarized in Tucker v. General Motors Corp., 945 F.2d 405 (6th Cir. 1991). The history of the doctrine under Ohio law is summarized in Sullivan v. General Motors Corp., 772 F. Supp. 358 (N.D. Ohio 1991).

[347]Hubbard v. Cleveland, Columbus, & Cin. Highway Inc., 81 Ohio App. 445, 76 N.E.2d 721 (1947) (the rule was found inapplicable on the facts of the case).

[348]*Id.*, 81 Ohio App. at 451, 76 N.E.2d at 724 (quoting 20 Am. Jur. at 188).

[349]Travelers Ins. Co. v. Knight Elec. Co., No. CA-8979, 1992 Ohio App. LEXIS 6664 at *2 (Stark County Dec. 21, 1992) (upholding preclusion of expert testimony and resulting summary judgment even though there was no evidence of bad faith).

[350]No. 940T017, 1994 Ohio App. LEXIS 4960 (Ottawa County Oct. 28, 1994).

expert testimony as a sanction for "spoliation of evidence."[351] The plaintiff (in this case) was under a duty to preserve evidence which he knew, or reasonably should have known, was relevant to the action. As photographic evidence was insufficient to rebut the presumption of prejudice caused by the destruction of the evidence, the grant of summary judgment was affirmed.

Transamerica Insurance Group v. Maytag, Inc.[352] The trial court's dismissal of this subrogation action was reversed. The claim arose from a fire loss due to an allegedly defective refrigerator power cord. The dismissal was predicated on the fact that the product was destroyed before suit was commenced. Although sanctions for spoliation can be imposed, the trial court erred by dismissing the case where there was no evidence that the loss was attributable to the plaintiff. The sanction must not be disproportionate to the seriousness of the infraction.

VI. Other Concerns

A. *Choice of Law*

By virtue of the fact that many products are sold and/or used across state lines, there is frequently a potential for the substantive law of another state to apply to actions brought in Ohio. This potential exists whether the action is brought in a federal court or a state court. In either case, the determination of which state's substantive law[353] applies will be governed by Ohio's choice of law rules.[354] Ohio began to limit the traditional approach of "*lex loci delicti*" in

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[351] *Id.* at *8-9.

[352] 99 Ohio App. 3d 203, 650 N.E.2d 169 (1994).

[353] Federal Rules of Procedure and Evidence apply in federal courts regardless of the applicable substantive law. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny. However, this is a complex area and the characterization process sometimes casts specific Rules as substantive for choice of law purposes. A good example, though not involving choice of law rules, is found in Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993), applying Ohio's substantive law to questions regarding the intentional tort doctrine and the existence of a claim for fear of cancer, while applying federal rules of procedure and evidence to issues such as consolidation and expert evidence. This rule can sometimes apply to what are usually considered procedural rules or defenses. For example, when a statute of limitations is considered part of the right, as distinct from a traditional time bar, it will be deemed substantive. *See, e.g.*, Nieman v. Press & Equip. Sales Co., 588 F. Supp. 650 (S.D. Ohio 1984) (applying the Colorado statute of repose, contained in its Product Liability Act, as part of Colorado's substantive law).

[354] Federal courts, when sitting in diversity actions, must apply the substantive law of the state in which they sit including its choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Tele-Save Merchandising Co. v. Consumers Distrib. Co., 814 F.2d 1120, 1122 (6th Cir. 1987). Related principles of jurisdiction and forum non conveniens often arise in cases involving choice of law issues. *See, e.g.*, Salabaschew v. TRW, Inc., 100 Ohio App. 3d 503, 654 N.E.2d 387 (1995) (forum non conveniens); Sherry v. Geissler U. Pehr GmbH, 100 Ohio App. 3d 67, 651 N.E.2d 1383 (1995) (jurisdiction); Watson v. Driver Management, Inc., 97 Ohio App.3d 509, 646 N.E.2d 1187 (1994) (forum non conveniens).

Fox v. Morrison Motor Freight, Inc.,[355] where Ohio law was applied to resolve an action brought by the Ohio administrator of an Ohio resident killed in an automobile accident in Illinois. The court adopted a substantial governmental analysis approach rather than the mechanical system called for by classical *lex loci* rules. Application of this more modern approach allowed the court to displace Illinois law.

Theoretical and practical distinctions between the rules of governmental interest analysis, other rule systems, and the "significant relationship" approach of the Restatement were resolved in *Morgan v. Biro Manufacturing Co.*[356] This case involved a product liability action seeking compensation for injuries sustained by a resident of Kentucky while using a meat grinder during his employment in Kentucky. The grinder was manufactured in Ohio by an Ohio company. The court upheld application of the Kentucky Product Liability Act through application of Restatement (Second) Conflicts of Law section 146 and related sections. This approach applies the law of the state having the "most significant relationship" to the action based on consideration and balancing of:

1. the place of injury;
2. the place where the conduct causing the injury occurred;
3. the domicile, residence, nationality, place of incorporation, and place of business of the parties;
4. the place where the relationship of the parties, if any, is located; and
5. any factors contained in section 6 of the Restatement which the court believes relevant.

Even if these principles call for application of foreign law, Ohio can refuse to apply that law if it is repugnant to Ohio public policy.[357]

Additional Decisions

Charash v. Oberlin College.[358] In this conversion action the court recognized that Ohio choice of law rules are predicated on the Restatement approach and that, therefore, *lex loci* is no longer the sole determinative factor.

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[355] 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971). *Accord* Schlitz v. Meyer, 29 Ohio St.2d 169, 280 N.E.2d 925 (1972).

[356] 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984). *See also* Duvall v. TRW, Inc., 63 Ohio App. 3d 271, 578 N.E.2d 556 (1991) (contract and tort principles in conjunction with a motion for national class certification).

[357] Moats v. Metropolitan Bank, 40 Ohio St.2d 47, 319 N.E.2d 603 (1974) (administration of the estate of an Ohio decedent is of direct concern to Ohio and that, therefore, application of the different law of Pennsylvania would violate legislative policy). *Accord* Jarvis v. Ashland Oil, Inc., 17 Ohio St. 3d 189, 478 N.E.2d 786 (1985) (law chosen by parties which is repugnant to Ohio policy will be given effect only if the foreign state has a materially greater interest than Ohio). *But see* Auto-Owner's Ins. Co. v. McMahon, 48 Ohio App. 3d 38, 548 N.E.2d 275 (1988), discussed *infra* at note 363.

[358] 14 F.3d 291 (6th Cir. 1994).

Schlitz v. Meyer.[359] This decision emphasizes the interests of Ohio as the forum state. The court determined that Ohio law governed a tort action where the accident occurred in Ohio even though all parties were non-residents.

Duvall v. TRW Inc.[360] In this product liability action the court found, as one of several reasons to deny class action status, that the Restatement approach might result in the application of various foreign laws to non-Ohio residents of the class.

Nationwide Insurance Co. v. Fryer.[361] Decedent and his administratrix were residents of Ohio. Decedent was killed in Pennsylvania through the negligence of a Pennsylvania resident. Recovery was sought pursuant to uninsured motorist provisions of a policy written in Ohio by a carrier whose principal place of business was in Ohio. Applying the tort provisions of the Restatement, including a presumption in favor of *lex loci*, the court held that Pennsylvania law governed and that, therefore, the Ohio policy could be reached.

Eischen v. Baumer.[362] The court applied Ohio law as *lex loci* does not govern choice of law determinations where all parties to an accident which occurred in Indiana were residents of Ohio.

Auto-Owners Insurance Co. v. McMahon.[363] Michigan law was applied where an accident occurred in Ohio but the injured parties were Michigan residents with payments made by a Michigan insurance carrier. Unless Ohio has significantly greater interest than the foreign state in having its own law applied, Ohio law will not be applied to tort actions even when application of a foreign law is repugnant to Ohio policy.

Barile v. University of Virginia.[364] The court applied the Restatement approach to determine that Virginia had the most significant relationship and that its law of sovereign immunity barred the action of an Ohio resident who was injured while playing football for the University.

B. *Class Actions*

The class action is a growing area for product liability litigation. Mass produced products, of similar design or chemical composition with identical warnings, instructions, and marketing approaches are naturals for class certification efforts. Economic, practical, and tactical considerations may support a class action claim despite its inherent expense and complexity. This

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[359] 29 Ohio St. 2d 169, 280 N.E.2d 925 (1972).

[360] 63 Ohio App. 3d 271, 578 N.E.2d 556 (1991).

[361] 62 Ohio App. 3d 905, 577 N.E.2d 746 (1990). This opinion presents an interesting analytical approach as the ultimate issue was one of contract law, but the action was tort based.

[362] 52 Ohio App. 3d 114, 557 N.E.2d 142 (1988).

[363] 48 Ohio App. 3d 38, 548 N.E.2d 275 (1988), relying on Sekeres v. Arbaugh, 31 Ohio St. 3d 24, 508 N.E.2d 941 (1987).

[364] 30 Ohio App. 3d 190, 507 N.E.2d 448 (1986).

approach is well suited to actions seeking compensation for defective products that will allegedly cause future harm without regard to present instances of actual harm or where there have been limited instances of actual harm.[365] Even a cursory review of current developments reveals an extensive variety of products, in addition to asbestos, DES, and silicone breast implants, that have been subject to class action efforts.[366]

Class actions are governed by Rule 23 of the Ohio Rules of Civil Procedure.[367] This complex Rule contains a set of standards which must be met to obtain class certification. Rule 23(A) sets forth four prerequisites for a class action: (1) numerosity; (2) common questions of law or fact; (3) typicality; and (4) adequate class representation. In addition, subdivision (B) mandates that even if subdivision (A) is met, there must also be either: (1) a risk of inconsistent results absent class status; (2) a possibility that adjudication by individuals would be dispositive of other parties' interests; (3) actions of a party opposing the class which require final injunctive or declaratory relief; or (4) a determination that a class action is superior to other methods of adjudication. Numerous Ohio decisions have addressed each of these prerequisites including a substantial number of Ohio Supreme Court decisions.[368]

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[365] *See* In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig., 23 Prod. Safety & Liab. Rep. (BNA) 424 (3d Cir. Apr. 17, 1995) (court rejecting class action settlement proposal for side-saddle fuel tank system).

[366] *See, e.g.*, In re Rhone-Poulenc Roror, Inc., 51 F.3d 1293 (7th Cir. 1995) (rejecting class certification for nationwide class of hemophilacs based on negligent handling of blood products - HIV); In re Copley Pharmaceuticals Inc. Prod. Liab. Litig., 23 Prod. Safety & Liab. Rep. (BNA) 539 (D. Wyo. Apr. 25, 1995) (reaffirming class certification for harm caused by the asthma drug Albuterol); In re Ford Motor Co. Bronco II Prod. Liab. Litig. 23 Prod. Safety & Liab. Rep. 378 (BNA) (E.D. La. Mar. 27, 1995) (decertification of class after rejection of proposed settlement); Miles v. American Medical Systems, Inc., 23 Prod. Safety & Liab. Rep. (BNA) 219 (N.D. Cal. Jan. 31, 1995) (motion to certify national class for penile implants); Bowling v. Pfizer, Inc., 23 Prod. Safety & Liab. Rep. (BNA) 108 (S.D. Ohio Jan. 24, 1995) (motion to clarify settlement of class action arising from defective heart valves); Ware v. World Rio Corp., 23 Prod. Safety & Liab. Rep. (BNA) 67 (E.D. Pa. Jan. 3, 1995) (filing of class action against hair straightener manufacture for alleged sores and hair loss); R.J. Reynolds Tobacco Co. v. Engel, 24 Prod. Safety & Liab. Rep. (BNA) 92 (Fla. Ct. App. Jan. 31, 1996) (upholding state-wide class alleging illness attributed to nicotine and smoking).

[367] The Ohio Rule, with the exception of minor word changes and the inclusion of subdivision (F) (Aggregation of Claims), is identical to Rule 23 FED. R. CIV. P. Federal law is beyond the scope of this article. *See generally* Eisen v. Carlisle & Jacquelin, 471 U.S. 156 (1974). This section will focus on the substantive aspects of the Ohio Rule rather than related procedural rules. Procedural aspects include such areas as whether a class certification order is a final appealable order, Dayton Women's Health Ctr. v. Enix, 52 Ohio St. 3d 67, 555 N.E.2d 956 (1990) (certification is final order), *contra* Blumenthal v. Medina Supply Co., 100 Ohio App. 3d 473, 654 N.E.2d 368 (1995); the standard of appellate review, Marks v. C.P. Chem. Co., 31 Ohio St. 3d 200, 509 N.E.2d 1249 (1987); and the effect of non-notice to a class member, Warner v. Waste Management, Inc., 36 Ohio St. 3d 91, 521 N.E.2d 1091 (1988).

[368] *See, e.g.*, Planned Parenthood Ass'n v. Project Jericho, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990)(Rule 23(B)(1)(a)); Warner v. Waste Management, Inc., 36 Ohio St. 3d 91, 521

One of the most well known and comprehensive product based decisions is that of the Court of Common Pleas in *Cleveland Board of Education v. Armstrong World Industries*.[369] In this case fifty-four public school districts and representatives of the Ohio Roman Catholic Diocese sought leave to intervene and join the Cleveland Board of Education in a class action against the manufacturers, distributors, installers, and others connected with the installation of friable asbestos in school buildings throughout Ohio. The suit sought damages for the cost of asbestos abatement as mandated by federal law.

After a certification hearing was held it was determined that the class, if allowed, would include over 600 plaintiff entities. The court first noted that class certification was not dependent upon the substantive merits of the action, but upon compliance with the provisions of Rule 23(A) and (B). The court found that the requirements of numerosity and commonality were met and noted that commonality is satisfied even absent complete identity of claims. To decide the question of typicality, the court first had to define the term. Rejecting the claim that the presence of distinct defenses negated typicality, the court held that this factor was met because the claims were "typical" of the class and did not reflect adversity between class members. Adequacy of representation was also met in that there was no evidence of collusion and no doubt as to the professional competence of plaintiffs' counsel.

The ultimate decision illustrates the importance of Rule 23(B) for, despite compliance with the four factors of Rule 23(A), the motion for class certification was denied as outside the purview of Rule 23(B)(3).[370] Although individualized determinations of damages do not alone negate class action certification, here each class member was viewed as a building rather than a school board. This distinction prohibited class certification.

Other differences also existed including, but not limited to: (1) identical applications of asbestos products could be legally defective in one building and not in another; (2) a given defendant's product could become friable in one location and not another; (3) liability standards differed dependent upon the status of given defendants; (4) different defenses existed as to various defendants; (5) no single act of negligence or proximate cause was applicable to each claim; and (6) legal duties differed in regard to warnings as they related to state of the art. Use of a class action was not the most efficient and fair way of proceeding when compared to other adjudicatory approaches. Efficiency and fairness were unlikely to exist as over 4,600 building appraisals would be needed with a possibility of 300,000 cross-examinations as to their accuracy, the case might degenerate into multiple law suits separately tried, jury selection

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N.E.2d 1091 (1988)(Rule 23(A)(1,2,4) and (B)(1)); Celebrezze v. Hughes, 18 Ohio St. 3d 71, 479 N.E.2d 886 (1985) (general); Schmidt v. AVCO Corp., 15 Ohio St. 3d 310, 473 N.E.2d 822 (1984) (Rule 23(A) and (B)); Ojalvo v. Board of Trustees, 12 Ohio St. 3d 230, 466 N.E.2d 875 (1984) (Rule 23(A)(2)); Vinci v. American Can Co., 9 Ohio St. 3d 98, 459 N.E.2d 507 (1984) (Rule 23(A)(1-4) and (B)(3)).

[369] 22 Ohio Misc. 2d 18, 476 N.E.2d 397 (1985).

[370] Plaintiffs invoked no other provision of Rule 23(B).

would be protracted as defendants might be entitled to 180 peremptory challenges, jury instructions could be inadequate to prevent jurors from using evidence improperly, and there would be adverse ramifications of having jurors sit for an extended time frame. All things considered, the court reasoned that:

> The invitation to declare a multi-plaintiff, multi-defendant, and multi-product class creates an allure of a legal paradise where we may all picnic together. This vision seems attractive from afar, but upon closer inspection, is a quicksand upon which this Court will not venture, for the result of such a step would be fear, panic and confusion.[371]

Additional Decisions

Jackson v. Glidden Co.[372] The trial court did not abuse its discretion by deferring a ruling on a motion to certify a class of children exposed to lead through paint products pending resolution of a motion to dismiss. This was a proper exercise of the court's power to control the litigation before it. As the court reversed portions of the decision dismissing the entire action, it is likely that a class certification ruling will ultimately be made.

Duvall v. TRW, Inc.[373] The trial court abused its discretion in granting a motion for class certification based on allegations of defects in the design and manufacture of a steering gear box. As the proposed class was national, plaintiffs had to establish a commonality of applicable law and failed in this obligation. Despite the fact that TRW is headquartered in Cleveland, the court found that there was no apparent benefit in basing the action in Ohio and that there were extensive problems with case management for the proposed class. Thus, this was not a superior method through which to adjudicate the controversy as required by Rule 23(B)(3). The existence of sufficient fact commonality was not enough to permit class certification.

Gilmore v. General Motors Corp.[374] A motion to certify the claims of forty-six plaintiffs asserting defects in Corvair automobiles manufactured from 1961-69 was denied. Neither the commonality requirement of Rule 23(A) nor other requirements for class action certification were met.

VII. THE FUTURE AND CONCLUSION

For a plaintiff to prevail in a product liability claim is more difficult today than in the decades of the 1970's and 1980's. This increased difficulty can be attributed to several factors including more astute and better coordinated

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[371] Cleveland Bd. of Educ., 22 Ohio Misc. 2d at 27, 476 N.E.2d at 407.

[372] 98 Ohio App. 3d 100, 647 N.E.2d 879 (1995).

[373] 63 Ohio App. 3d 271, 578 N.E.2d 556 (1991).

[374] 35 Ohio Misc. 36, 300 N.E.2d 259 (Ohio C.P. 1973).

defense efforts, a greater willingness of defense counsel and their clients to bring a case to trial, increased financial costs to provide necessary testing and expert testimony, and the influence of reform legislation. Paradoxically, at least from the plaintiff's perspective, a significant reason why prevailing in a product liability claim is more difficult is that manufacturers are making safer products and consumers seem to have become more safety conscious and more willing to pay for safety. To this extent a major goal of product liability law is gradually being attained.

At the time this article was submitted for publication, House Bill 350 had passed in the Ohio House and, with some amendments, in the Ohio Senate. Governor Voinovich had indicated that he would sign the Bill into law. At this time the Bill is before a conference committee which is expected to report out on or before September 13, 1996. It is likely that the conference committee proposal will be enacted prior to the November, 1997 election. Regardless of the final form the Bill takes, it is evident that it will make the successful litigation of a product liability claim somewhat more difficult than at the present time. Moreover, it will require counsel to, once again, deal with distinct bodies of law based on the effective date of the new Act and its relation to any action.

The ramifications of the new law are both beneficial and detrimental. The law will be beneficial as it will discourage frivolous actions which cost manufacturers substantial sums to defend both in dollar amounts and in lost productivity of key workers and executives. Many of these costs were, of course, passed on to consumers. It will also allow for a more appropriate determination of defect and provide other appropriate protection to manufacturers. In part, however, the law will be detrimental. The legislation will make it very difficult for injured parties, who have legitimate claims, to proceed with those claims. A small number of possibly unfair, potentially unconstitutional,[375] provisions will prevent or limit some number of injured parties from gaining full compensation where such recovery is justified. Though on balance House Bill 350 is good legislation, its flaws detract from its goal of setting a proper balance between the responsibilities of manufacturers and those of consumers.

Unlike the prior Act, this legislation will establish new law rather than acting primarily as a codification of existing law. As substantive laws cannot be given retroactive effect, existing law will remain in effect for the many cases filed prior to the ultimate effective date of an enacted House Bill 350. The new legislation will, however, have a significant impact on future litigation. The major changes contained in the House version of the Bill which are likely to be signed into law include the following:

1. A two year statute of limitations coupled with a fifteen year statute of repose including discovery provisions. Inclusion of this provision negates any

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[375] *See*, Stephen J. Werber, *Ohio Tort Reform versus the Ohio Constitution*, 69 TEMP. L. REV. (forthcoming Jan. 1997).

need to revisit the question of whether this Bill creates a statutory cause of action subject to a longer limitation period.

2. Abrogation of the consumer expectancy definition of defect. All manufacture and design defect claims will be considered exclusively under the factors of risk/benefit analysis. As the consumer expectancy test is not needed for manufacture defect determinations, and is inadequate for design defect determinations, this change should prove beneficial.

3. Extension of the principles of comparative fault to product liability claims. This change is long overdue and reflects the law of the majority of our sister states. The provision also changes existing law by allowing the contribution to harm of non-parties to be considered by the fact-finder. This change eliminates various tactical questions that previously had an impact upon designation of defendants and settlement efforts while ensuring that fact-finder determinations can reflect the totality of injury causing factors. It appears that assumption of the risk will remain a complete defense.

4. The doctrine of joint and several liability will be limited. Joint liability will exist only when a defendant is more than fifty percent liable for the harm. In such cases that defendant will be jointly and severally liable for economic loss, but be only severally liable for non-economic loss. Any defendant less than fifty percent at fault will be liable only for its share of the judgment. Although strong arguments can be presented both for and against the total abrogation of joint and several liability, this compromise, in comparison to existing law, more accurately reflects fact-finder determinations.[376]

5. Creation of a drug and alcohol abuse defense so that when a plaintiff's substance abuse was a factor in bringing about an injury causing event while that plaintiff was operating a motor vehicle, that conduct will be considered in the calculus of causation. In such cases the substance abuse will be treated as a presumptive cause of harm. This will have special impact in crashworthiness litigation where the cause of the event has generally been deemed irrelevant. It is a recognition that injury is caused by the joinder of product, user, and the environment in which that product and user come together.

6. Modification of the laws relating to the effect of a release or judgment in a personal injury action so that resolution of that action will preclude a subsequent wrongful death action based on the same product defect or exposure. The intent of this provision, though not clearly stated, is that it apply only to situations in which the potential for death was recognized at the time the personal injury action was resolved *e.g.*, resolution of a claim for asbestosis will preclude a subsequent claim for mesothelioma.

[376]Although this partial abrogation of joint and several liability where a comparative fault finding has been made by the jury is consistent with prior Ohio law and parallels similar approaches in several jurisdictions, it may raise constitutional issues. Merging these doctrines can be viewed as a violation of either substantive due process or the right to trial by jury under the Ohio constitution. Such a ruling would not be surprising in light of the reasoning found in Ohio Supreme Court decisions invalidating various other legislative efforts to limit tort liability as previously discussed herein.

7. A limitation on the award of noneconomic damage awards. Noneconomic loss caps are provided in a two tier system. Under the first tier, such losses are limited to $250,000 or four times the amount of economic loss to a maximum of $500,000. Under the second tier, the maximum becomes $1,000,000 if standards as to the degree and permanence of injury or the effects of injury are met. A constitutional challenge to the validity of this provision can be expected.

8. A limitation on the award of punitive damages and related modification of existing law. The changes include:

a. Before submitting the question of liability to the jury the trial judge must determine, after a hearing, that based on clear and convincing evidence a reasonable basis exists to support a finding of malice or egregious fraud;
b. Bifurcation of the trial so that no issue of punitive damages can be raised until there is a finding that a compensatory award should be made;
c. Damages shall not exceed three times the total compensatory award or $250,000 whichever is greater, but the court can increase the award to a multiple of six;
d. Limitations on the award of multiple punitive damages based on the same act or course of conduct; and
e. Expanding the governmental compliance standard, which currently prevents imposition of punitive damages upon ethical drug and device manufacturers, to include over the counter drugs, medical devices, and other manufacturers.

A constitutional challenge to the validity of these provisions can be expected.

9. A limited abrogation of existing law precluding evidence of collateral source payments. The fact-finder will be permitted, but not compelled, to reduce judgment by the amount of collateral benefits received which are not subject to subrogation and where plaintiff did not pay the premium to obtain the benefit. This provision recasts a prior unconstitutional law in a manner that appears to conform to the court's analysis of the former law's inadequacies.

10. The case law which now limits successor corporate liability is codified. There is no such liability absent the existence of one of the four previously recognized business oriented exceptions.

11. No industry wide or enterprise liability based claims predicated on the joint awareness of risks associated with joint development of standards will be permitted. Alternate liability remains as a cause of action provided that all defendants are named and subject to jurisdiction. The limitations imposed are strict as they preclude use of the doctrine where a defendant is unavailable regardless of the reason for that absence.

The harshness of these limits does not appear to be mollified by creation of a new cause of action for those injured by hazardous or toxic substances. To succeed, the plaintiff must identify a specific defendant or defendants whose conduct or action was a substantial factor in bringing about the harm. This new action does little more than recognize an existing cause of action and may be more of a limiting than expanding liability factor.

12. A statutory equivalent to Evidence Rule 407 precludes use of subsequent remedial measures as evidence that the measure made an event

more or less likely to occur. Traditional exceptions to the exclusionary rule are retained.

13. Evidence of a recall notification is admissible to establish that a defect existed at the time of product manufacture upon a showing that the recall addresses a defect which was the cause of harm. Non-compliance with a recall notification is admissible to establish assumption of the risk or superseding cause. Recall notification is also deemed relevant on the question of punitive damages as it will be considered evidence that a manufacturer did not act in flagrant disregard of safety.

Editor's Note

Am. Sub. H.B. 350, in a form substantially similar to that discussed in this article, was passed by the Ohio Senate on September 12, 1996 and by the Ohio House on September 26, 1996. The Bill was signed by Ohio Governor George Voinovich on October 28, 1996 and will take effect ninety days after signature - January 26, 1997.